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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Kunstsammlungen zu Weimar ("Kunstsammlungen"), prays that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit entered on April 25, 1973.

Opinion Below

The opinion of the court of appeals is reported at 478 F.2d 231, and is printed herein as Appendix B. The district court wrote two opinions: one on June 25, 1970, the second on September 25, 1972; both are reported at 358 F.Supp. 747, and are printed as Appendix C.

Jurisdiction

The judgment of the court of appeals was entered on April 25, 1973. A petition for rehearing and a suggestion for rehearing in banc were denied by orders dated June 18, 1973 (Appendix D). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Questions Presented

The ultimate issue is whether the courts below erred in holding that, because of its relationship to the government of the German Democratic Republic ("the GDR government"), which has not yet been recognized by the executive branch, Kunstsammlungen, an East German corporate entity, may not sue in our courts to recover two Duerer paintings to which it claims title and which were stolen in 1945 from a castle in East Germany where they had been deposited for safekeeping during World War II.

Determination of that issue presents the following questions:

1. Whether the fact that the GDR government has not yet been recognized would prevent it from suing to recover the Duerer paintings were it the plaintiff asserting a claim on its own behalf.

2. If so, whether Kunstsammlungen, because of its relationship to the GDR government, also may not sue.

3. Whether the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, which the executive declared was still effective as to the area of East Germany, required that Kunstsammlungen be accorded access to the courts of the United States.

4. Whether the executive's position that the government of the Union of Soviet Socialist Republics ("the USSR government") was the sovereign power in East Germany and the GDR government merely its agent, required that the courts hold that Kunstsammlungen, even if found to be an "arm and agency" of the GDR government, was an instrumentality of the recognized USSR government and thus not precluded from suing.

Constitutional Provisions and Treaty Involved

This case involves Article II, section 2 and the Fifth Amendment of the Constitution, and Article XII of the Treaty of Friendship, Commerce and Consular Rights between the United States and Germany, December 8, 1923, 44 Stat. 2132 (1927), T.S. No. 725. The treaty provisions are printed as Appendix A.

Statement

These actions involve two very valuable paintings executed by the great German painter and engraver, Albrecht Duerer. For many years before World War II, these paintings were contained in the Staatliche Kunstsammlungen zu Weimar ("the Weimar Museum") art collections, located in Weimar, a city of the then Land (State) of Thueringen (Thuringia), Germany. During the War, the paintings were deposited for safekeeping in a castle in the neighboring town of Schwarzburg. In June 1945, while the United States Army was occupying the Schwarzburg castle, the paintings were stolen. Efforts to locate them proved futile until 1966, when they were found in the possession of respondent Edward I. Elicofon ("Elicofon").

The Prior Proceedings

In January 1969, the government of the Federal Republic of Germany ("the FRG government") commenced an action to recover the paintings in the District Court for the Eastern District of New York. Its complaint alleged that since 1824, the Duerer paintings had been part of an art collection in Weimar, which was continued after 1921 as the Weimar Museum; that they were exhibited there until 1945; that they were removed for safekeeping to the Schwarzburg castle; that while stored there and during the United States occupation, they were stolen; that they were then the property of the Weimar Museum, which belonged to the State of Thuringia, one of the federal states of the German Reich; that Elicofon acquired them from the thief; and that Elicofon has neither title to nor right to possess them. The FRG government claimed that it was "the only lawful and recognized successor" to the German Reich, "the only government which may represent the German people" and the only party "properly entitled to the immediate custody and possession of the Duerer Paintings".[1] It asked that Elicofon be directed to deliver the paintings to it.

In March 1969, the Grand Duchess of Saxony-Weimar intervened, claiming ownership of the paintings by assignment from the Grand Duke, who she alleged had acquired full rights to the paintings when, in 1945, he terminated an earlier settlement agreement under which the Weimar Museum was granted the right to exhibit them. The Grand Duchess asked that Elicofon be directed to deliver the paintings to her.

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[1] The FRG government also claimed that it adequately represented the interests of Kunstsammlungen in the action. The courts below did not pass on that claim.

In April 1969, Kunstsammlungen moved for leave to intervene, as of right, as a party plaintiff. Its proposed intervenor complaint alleged that it was the successor to the Weimar Museum, which was in possession of the paintings when they were stolen, and was entitled to their return. The other parties opposed its intervention, contending that whatever the rights of Kunstsammlungen it could not sue in our courts because it was an instrumentality of the unrecognized GDR government.

Kunstsammlungen also commenced a separate action against Elicofon for return of the paintings. Elicofon moved to dismiss the complaint in that action, again on the ground, *inter alia*, that Kunstsammlungen was an instrumentality of an unrecognized government and therefore could not sue.

In July 1969, the United States Attorney for the Eastern District of New York filed a "Suggestion of Interest" in the FRG government action, submitting, at the request of the State Department, the following "views of the Executive Branch": (1) the United States government does not recognize the East German regime; (2) it recognizes the FRG government "as the only German Government entitled to speak for Germany as the representative of the German people in international affairs"; and (3) it recognizes the FRG government as "entitled in this litigation to represent the Weimar Museum as trustee of its interests".

The district court, in a memorandum of decision of June 25, 1970 (Appendix C, *infra*, pp. 6a-11a), ruled that the unrecognized GDR government would not have been permitted to sue in an action like this one and that if it were found that Kunstsammlungen was "an arm or instrumentality of the G.D.R." it too would be barred from suing to recover the paintings. The court was not prepared to determine Kunstsammlungen's right to sue on affidavits alone

and therefore directed that a hearing be held on its relationship to the GDR government. Depositions were then taken overseas, of a director of the former Weimar Museum, the director of Kunstsammlungen, and two experts on East German law; another expert on East German law (an employee of the FRG government) testified in open court in New York.

On September 25, 1972, the district court, in a second, supplemental opinion (Appendix C, *infra*, pp. 11a-17a), held that Kunstsammlungen's relationship to the GDR government was such as to constitute it its "arm and agency", and that therefore it could not sue to recover the paintings. The court entered an order denying Kunstsammlungen's motion to intervene in the FRG government action and directed judgment dismissing the complaint in the Kunstsammlungen action.

On appeal to the Court of Appeals for the Second Circuit, the order and judgment of the district court were affirmed per curiam "for the reasons given" in the district court's opinions (Appendix B, *infra*, pp. 2a-5a). A petition for rehearing and suggestion for rehearing in banc were denied on June 18, 1973 (Appendix D, *infra*, pp. 18a-19a).

The Nature of Kunstsammlungen's Claim to the Paintings

Kunstsammlungen is a legal entity, whose status as "juristic person" was established by order of the Minister of Culture of the GDR government dated April 14, 1969, and made effective as of January 1, 1969. It acts, in legal and other matters, through its director and in accordance with by-laws promulgated by the director.[2] It holds and administers the palaces, museums, buildings, and collections of paintings and art objects located in Weimar (in

[2] The by-laws of Kunstsammlungen are appended to the district court's opinion of September 25, 1972, *infra*, pp. 15a-17a.

East Germany) which before 1969 comprised the properties of the Weimar Museum.

Prior to World War I, the then Grand Duke of Saxony-Weimar-Eisenach was in possession of these properties. In 1919, shortly after he abdicated, the properties (including the Duerer paintings) were transferred to the District of Weimar, and in 1923 they came into the possession of the newly established State of Thuringia, one of the States of the then German Republic.

From that time until the Hitler period, possession remained in the State of Thuringia. There is some question whether that State continued to own the museum properties during the Third Reich period of centralization of governmental authority, but clearly after the surrender of Germany and the accession of the Allied occupation authorities in 1945 the properties again came into the possession of the State of Thuringia. They remained in its possession even after the German Democratic Republic was established in 1949 (with Thuringia as one of the constituent States). In 1952, however, the States in East Germany were abolished as political subdivisions, and Thuringia was subdivided into three Bezirke (Counties) and thirty-six Kreise (Districts). Possession of Thuringia's properties was thereupon transferred to the various towns and villages of the State, and the museum properties now came into the possession of the City of Weimar, one of the newly created urban Districts in the County of Erfurt.

Thus, the art collections in Weimar were at all times held and administered by the local authorities, rather than by the central government authorities in Berlin. When Kunstsammlungen was established as a discrete legal entity, effective as of January 1, 1969, the rights and obligations incidental to the possession and administration of the museum properties passed to Kunstsammlungen.

REASONS FOR GRANTING THE WRIT

I

The holding that Kunstsammlungen may not sue to recover the stolen Duerer paintings because of its relationship to the unrecognized GDR government presents important questions of federal law which have not been and should be settled by this Court.

The courts below accepted as established doctrine that a foreign government not yet formally recognized by the executive branch of our government may not sue in our courts. Then, finding that Kunstsammlungen was closely related to the unrecognized GDR government, they held that that entity too might not sue, even to recover the Duerer paintings which had been stolen while the United States Army was in occupation of Weimar at the end of World War II.

The questions of federal law presented by this holding unquestionably are of great importance and have not been, but should be, settled by this Court.[3] It is moreover sig-

[3] The opinion of Mr. Justice Stone in *Guaranty Trust Co.* v. *United States,* 304 U.S. 126 (1938) stated, in passing, that "[i]t is not denied that, in conformity to generally accepted principles, the Soviet Government could not maintain suit in our courts before its recognition by the political department of the Government." (at 137) But, as that *dictum* indicates, the rule was not put in issue in the case. It was unnecessary to the Court's holding to inquire into or evaluate the "accepted principles" referred to, and the Court in fact did not do so. Moreover, the State Department had recognized another government, the exiled Provisional [Kerensky] Government, as the legitimate sovereign for Russia (304 U.S. at 138), thus giving rise to a situation quite different from that in the present case, where the executive recognized no government for the area of East Germany (unless, as we unsuccessfully urged below, it did recognize the U.S.S.R. government as such). See, *infra,* pp. 13-14 and Point III.

nificant that in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), the Court suggested the need for consideration and resolution of these questions. Pointedly referring to the literature criticizing the "doctrine that nonrecognition precludes suit by the foreign government in every circumstance" and explicitly refraining from intimating any view "on the possibility of access by an unrecognized government to United States courts" (376 U.S. at 411, n. 12), the Court plainly evidenced a willingness to consider the doctrine. Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l. L. 935, 950, n. 49 (1964). The present case presents an excellent opportunity to do so.

The particular circumstances here especially warrant the grant of certiorari. The decisions below prevent a foreign national from obtaining any judicial determination of its rights to property stolen and transported to the United States, solely by reason of its relationship to a government not yet accorded formal recognition by our executive. Thus, "a unique sort of *res nullius*" is created, see Dickinson, *The Unrecognized Government or State in English and American Law*, 22 Mich. L. Rev. 118, 123-24 (1923), Borchard, *The Unrecognized Government in American Courts*, 26 Am. J. Int'l. L. 261, 267 (1932); a thief's "title" is substantially immunized from challenge in the courts; and grave questions of substantive due process are raised, cf. *Russian Volunteer Fleet* v. *U.S.*, 282 U.S. 481 (1931).

The decisions are wrong, and their error lies in the assumption that it is an invariable rule that until the executive branch recognizes a foreign government, the judicial branch may not accept that government (or a national closely related to it) as a plaintiff in any court and

in any case.[4] This assumption betrays a regrettable failure to apply a reasoned policy-oriented analysis to the problems posed when a nonrecognized government sues. On such an analysis, we submit, one finds no basis in policy or precedent for denying it the right to sue in circumstances such as are present here, where what is sought is a judicial determination of rights to property.

The justification usually advanced for preventing the unrecognized government from suing is that if the courts allowed it to do so, they would be compromising the policies underlying nonrecognition (policies seldom, if ever, articulated) and impeding the executive branch's exercise of its foreign affairs functions. Those fears we shall presently show are ephemeral at best. But even if they were real, one must be mindful also of the substantial interests in assuring to all persons, including foreign governments, a full opportunity to obtain judicial determination of their rights in the courts of the United States. A responsible exercise of the judicial function undoubtedly requires that these competing interests be evaluated and a serious effort made to reconcile or at least to accommodate them.

The courts below, however, failed to weigh the conflicting considerations or to attempt their reconciliation. Instead they deferred unquestioningly to the supposedly urgent demands of executive policy. They neither sought articulation of the specific policies which underlay the failure to recognize the GDR government or inquired to what extent, if at all, those policies would be impaired if, in the circum-

[4] Although, by way of footnote, the district court intimated that "special circumstances" might justify a departure from this rule where "action by the President can be interpreted as creating an exception to the rule" (*infra*, p. 10a), it applied the rule as an absolute prohibition against suit, and engaged in no inquiry as to whether there were "special circumstances" which warranted permitting Kunstsammlungen to sue to recover the paintings.

stances of this case, suit were permitted. They imposed an absolute prohibition against suit. In substance, the decisions below were a complete abdication in favor of the executive.

We do not question that the political branches are charged with the foreign affairs power, and that the courts should honor executive determinations in that area. But "it cannot, of course, be thought that 'every case or controversy which touches foreign relations lies beyond judicial cognizance' ". *Baker* v. *Carr*, 369 U.S. 186, 211 (1962). And it is our submission that in the circumstances of this case, and cases like it, an unrecognized government and its nationals should be permitted to sue because to do so would in no way impugn the executive's prerogative. For, when a *de facto* government prosecutes an action to recover property, its legitimacy as sovereign—the essence of recognition—is not put in issue at all. Thus, in such a case, there is no "possible incongruity" between the courts' accepting the government as a party, and the executive's refusing to grant it *de jure* recognition.

There is absolutely no logic in an absolute rule that bars an unrecognized government from the courts, whatever the nature of the action or the circumstances giving rise to it. Surely there is nothing talismanic in nonrecognition. It signifies merely the unwillingness of our executive branch for the time being to accept the foreign government as legitimate sovereign for the territory it governs. It certainly does not deny that the government exists and in fact controls the territory. See, *e.g.*, *Salimoff & Co.* v. *Standard Oil Co.*, 262 N.Y. 220, 227 (1933); *Russian Reinsurance Co.* v. *Stoddard*, 240 N.Y. 149 (1925); see generally Lubman, *The Unrecognized Government in American Courts: Upright* v. *Mercury Business Machines*, 62 Colum. L.Rev. 275, 291-97 (1962). As the *Salimoff* Court put it:

"'Recognition does not create the state.' (*Wulfsohn* v. *Russian S.F.S. Republic*, 234 N.Y. 372, 375.) It simply gives to a *de facto* state international status." 262 N.Y. at 226-27.

Thus, a foreign government is cognizable juridically even though it has not yet been formally recognized. See, *e.g.*, *Carl Zeiss Stiftung* v. *VEB Carl Zeiss, Jena*, 293 F.Supp. 892 (S.D.N.Y. 1968), *aff'd*, 433 F.2d 686 (2d Cir. 1970), *cert. denied*, 403 U.S. 905 (1971); *Wulfsohn* v. *Russian Socialist Federated Republic*, 234 N.Y. 372 (1923); *Upright* v. *Mercury Business Machines Co.*, 13 A.D.2d 36 (1st Dep't 1961). And our courts, implicitly acknowledging this on many occasions and in a diversity of contexts, have readily acknowledged the existence of *de facto* governments, albeit non-legitimatized, and have accorded full effect to the consequences of their governmental acts. See, *e.g.*, *Russian Reinsurance Co.* v. *Stoddard*, *supra*, 240 N.Y. at 158; *Salimoff & Co.* v. *Standard Oil Co.*, *supra*, 262 N.Y. at 227; see also Jaffe, *Judicial Aspects of Foreign Relations*, 149-51 (1933); Lubman, *supra*, 62 Colum. L.Rev. at 292.

That the courts have done so has never been thought to impede the executive's exercise of its foreign affairs powers. After all, once one admits (what one can hardly deny) that a foreign government, although not yet recognized, is capable of engaging in commercial transactions and of holding property in its name, it makes no sense and serves no purpose to prevent that government from suing to enforce rights arising from such transactions and the holding of such property. See Lubman, *supra*, at 306-08. To permit it to sue in such cases is to acknowledge only that it exists, not that it is a legitimate sovereign in the community of nations.[5]

[5] The case might well be otherwise where a rival party recognized by the executive asserts that *it* is the government of the

The rule which would exclude the unrecognized government from the courts in every case appears first to have been announced during the anti-Soviet hysteria of the 1920's, in *Russian Socialist Federal Soviet Republic* v. *Cibrario,* 235 N.Y. 255 (1923). Several later decisions accepted the rule uncritically. But *Cibrario* inspired almost universal adverse, and we believe quite warranted, criticism. See, e.g., Lubman, *supra,* at 299; Borchard, *supra,* at 266, Dickinson, *supra,* at 123; Jaffe, *supra,* at 149-156; Frankel, *The Juristic Status of Foreign States, Their Property and Their Acts,* 25 Colum. L. Rev. 544 (1925); Doukas, *The Nonrecognition Law of the United States,* 35 Mich. L. Rev. 1071 (1937). And courts, resorting to fictions and procedural technicalities, strained to avoid the harshness of the rule. See, e.g., *Russian Government* v. *Lehigh Valley R.R.,* 293 Fed. 135 (S.D.N.Y. 1923); *Lehigh Valley R.R.* v. *State of Russia,* 21 F.2d 396, 401 (2d Cir. 1927), *cert. denied,* 275 U.S. 571 (1927); *Amtorg Trading Corp.* v. *United States,* 71 F.2d 524 (C.C.P.A. 1934); *The Maret,* 145 F.2d 431 (3rd Cir. 1944); see also, *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931). Moreover, the rule in *Cibrario* is the very one which the *Sabbatino* court suggested needed rethinking. 376 U.S. at 411, n. 12.

There may be situations where if a court were to permit an unrecognized government to sue it might unavoidably be expressing judgment on its legitimacy as sovereign. That might occur, for example, where two parties claimed to be the government for the particular territory, and only one of them had been recognized by the executive branch, see, e.g., *Bank of China* v. *Wells Fargo and Union Trust Co.,* 92 F.Supp. 920 (N.D. Cal. 1950), *appeal dismissed,* 190 F.2d 1010 (9th Cir. 1951), *judgment entered,* 104

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territory in question and seeks, on its own behalf, to enforce the rights in issue. In such a case, denial of the right to sue to the unrecognized government might be justified. See *infra,* pp. 13-14.

F.Supp. 59 (N.D. Cal. 1952), *modified* 209 F.2d 467 (9th Cir. 1953); or where, as in the event of a civil war, the *de facto* existence of the suing government was not clearly provable. In the present case, however, no rival party recognized as such by the executive claims to be the legitimate sovereign for East Germany. Moreover, there can no longer be the slightest doubt that the GDR government exists, and that it governs in the area of East Germany.[6]

The district court read the *Sabbatino* opinion as "productive of a rule which would deny to the G.D.R. [and every other unrecognized government] the right to bring suit in our courts in an action like the one at bar" (*infra*, p. 10a). That is plainly to misread *Sabbatino*. The Court neither stated nor suggested any such rule. On the contrary, as already noted, it explicitly said that it was not intimating any view "on the possibility of access by an unrecognized government to United States courts". 376 U.S. at 411, n. 12.

Rather than suggesting an absolute bar to suit by an unrecognized government, the *Sabbatino* opinion declared that "the courts of this country should be closed to the

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[6] The Basic Treaty between the FRG and GDR governments, which became effective on June 21, 1973, declares the sovereignty, independence and autonomy of the German Democratic Republic and establishes diplomatic relations between the two German States and their governments. Seventy other states (including the United Kingdom, France and Japan) have established diplomatic relations with the GDR government. The GDR government is represented by a permanent observer in the United Nations. Its application for admission to plenary membership in the United Nations has been recommended for Assembly approval by unanimous vote of the Security Council (including the vote of the United States). In early August, representatives of the United States and GDR governments initiated formal discussions for the purpose of establishing diplomatic relations, and representatives of the United States government and the GDR government have since been conferring in East Berlin and in Washington regarding the establishment of formal relations between the two governments.

government of a foreign state . . . [only if] the underlying reason [for doing so] is one of national policy transcending the interests of the parties to the action . . ." 376 U.S. at 408. In rejecting the contention that the severance of diplomatic relations with the still recognized Cuban government was reason to deny that government the right to sue, the Court distinguished the situation from one of diplomatic nonrecognition, which it said had the "unique legal aspect" of signifying "this country's unwillingness to acknowledge that the government speaks as the sovereign authority for the territory it purports to control". 376 U.S. at 411. But the Court did not say that the unrecognized foreign government must be barred from suing in *every case*. It anticipated that each particular case would stand on its own legs, and that in every case the courts would weigh the underlying policy reasons, if any, for closing the courts to the foreign government suitor, against the interests of the parties in securing a judicial determination of their rights. The courts below, however, failed to strike such a balance.[7]

Respondent Elicofon has defended the decisions below as evidencing a "strict neutrality" in the conduct of foreign policy, in his view the exclusive domain of the executive branch. But it is obvious, of course, that refusing to permit Kunstsammlungen to secure an adjudication of its rights in the Duerer paintings is far from a neutral act. For, the decisions below relieve Elicofon from the burden of defend-

[7] Moreover, as Professor Falk cogently remarked, the holding in *Sabbatino* that no policy considerations justified barring the recognized Cuban government from suing is persuasive argument for according the right to sue also to unrecognized governments. For there is simply no reason, he presciently noted, "to treat Mao's China differently from Castro's Cuba in United States domestic courts merely because one government is unrecognized whereas diplomatic relations with the other have been severed". Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l. L. 935, 950 (1964).

ing against the claim asserted by the only party which alleges successorship to the owner of the paintings when they were stolen (that is, Kunstsammlungen).[8] And, by depriving it of any right to recover property, they penalize that party because of its relationship to the unrecognized GDR government, notwithstanding the fact that there is no evidence at all that in refusing to recognize the government the executive branch intended that it or its nationals suffer any penalty.[9] Whatever reasons may have moved the *Cibrario* court to punish the Bolshevik government during the hysteria of the 1920's, there is certainly no justification for penalizing the GDR government, whose application for United Nations membership the United States has supported and whose representatives are presently conferring together with ours for the early establishment of diplomatic relations between the two nations.

The only basis for the rulings below is a blind deference to imagined demands of executive power. Such an abdication of judicial responsibilities is most unfortunate and

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[8] Whatever the status of the FRG government may have been at the time this case was commenced, it unquestionably does not now assert rights on behalf of the people of East Germany or of the Weimar Museum. Such a position would be completely inconsistent with the June 1973 Basic Treaty between the FRG and GDR governments. See, *supra*, p. 14, n. 6. Moreover, the United States has never recognized the FRG government as having sovereign authority over East Germany. See Bathurst & Simpson, *Germany and the North Atlantic Community*, 206-07 (1956); *Contemporary Practice of the United States Relating to International Law*, 57 Am. J. Int'l L. 403, 410 (1963); see also, *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena*, 293 F.Supp. 892, 912 (S.D.N.Y. 1968), *aff'd.*, 433 F.2d 686 (2d Cir. 1970), *cert. denied* 403 U.S. 905 (1971); *Upright* v. *Mercury Business Machines Co.*, 12 A.D.2d 36 (1st Dept. 1961).

[9] Rather, the refusal to recognize the GDR government was based on a deference to the earlier views of the FRG government; which, however, as we have indicated, has itself now recognized the legitimacy and sovereignty of the GDR government.

should be corrected by this Court. Professor Jaffe's admonition, we submit, is worthy of note and should be heeded:

> ". . . to make its [the unrecognized government's] rights turn on the 'attitude' of the foreign office is a dangerous principle. The arguments which make it applicable to non-recognition make it applicable to severance of diplomatic relations, to any case in which our foreign policy negatives the facts of 'comity'. There is nothing in the statutes, nothing in the nature of recognition as a process, which compels the result. It proceeds from an idea that where a case has a bearing on foreign affairs, the court must subordinate its ordinary procedures and adjust its decision to the supposed needs of the foreign office. It seems to us that the relation between the two departments should be one of *mutual* respect. To allow suit contradicts nothing that the Department of State has said or done, creates no conflict between the departments. If it places limits on the effectiveness of a particular foreign policy, that merely testifies that the claims of foreign policy are no more absolute than any other." (Jaffe, *Judicial Aspects of Foreign Relations* 155-56 (1933))

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There is an additional feature of this case, beyond the fact that it is one for an adjudication of property rights, which underscores the necessity for this Court's review on certiorari. That is the fact that Kunstsammlungen, not the unrecognized GDR government, is the suitor here.

As we have shown, there is only the remotest risk that if the GDR government were allowed to sue the executive's nonrecognition policy would be compromised, and its conduct of foreign affairs impeded. But to whatever extent

that minimal risk might justify excluding the *government* from the courts, it does not justify excluding a party other than the government. For, there is no risk of embarrassment to or conflict with the executive policy in such a case, and the considerations which supposedly underlie the rule are absent there.

Assuming some validity in the doctrine against suit by unrecognized governments, it unquestionably should be applied only where absolutely necessary and with extreme caution. To close our courts to any aggrieved person is repugnant to the basic tenets of our judicial system. To do so in any case in deference to the political branches is unavoidably in some measure to shirk judicial responsibility. And to do so in a case of this kind, where property rights are in issue, raises serious questions of substantive due process. Cf. *Russian Volunteer Fleet* v. *United States,* 282 U.S. 481 (1931).

It behooves the courts therefore, insofar as they choose to apply the exclusionary rule, to define its parameters narrowly. This contemplates, we submit, that the doctrine be limited to cases in which the unrecognized regime itself is the nominal party, unless there be a clear showing that permitting suit by the non-government party will seriously interfere with the executive's foreign affairs function.

There was no such showing here. True, an issue was raised as to Kunstsammlungen's relationship to the GDR government in Berlin. But that issue was only secondary and, more significantly, wholly unrelated to the validity of Kunstsammlungen's claim to the paintings. Whatever may be the relationship of Kunstsammlungen to the government, the executive branch could not conceivably be embarrassed by entertaining a suit by such an entity, an art museum, to recover paintings wrongfully appropriated from it.

The district court, having first concluded that a suit by the GDR government would have to be barred because its claim to the paintings "would, by definition, be a claim on behalf of the people it purports to govern" (*infra*, p. 10a), assumed that Kunstsammlungen's assertion of right was premised on such a claim also. But Kunstsammlungen did not rely on any such ethereal notions. It based its claim of title simply on successorship to the right, title and interest of the Weimar Museum, which admittedly was in possession of the paintings when they were stolen.

When it put the exclusionary rule into play by characterizing the claim to the paintings as one "on behalf of the [German] people," the district court in effect resolved the question of title to the paintings before any proof on that issue was adduced, thus prematurely reaching the merits of the controversy. The proper course was rather to permit Kunstsammlungen to sue, whatever its relationship to the GDR government; and then, if on the merits it were decided that the owner of the paintings was "the German people", at that point, and only then, to inquire into Kunstsammlungen's status. Only then would the question of its continued participation in the suit have become relevant.

Moreover, the evidence before the district court established that the relationship between Kunstsammlungen and the GDR government was so remote that it was clearly error to find that it was an "arm and agency" of that government.[10] This is not the place, however, to argue

[10] The uncontradicted proof demonstrated that insofar as the actual administration of Kunstsammlungen and the conduct of its affairs were concerned, its director acted on his own responsibility and without any prior consultation with or approval by the GDR government; that there had not been any contact with that government; and that the government never intruded in any way into its affairs. The district court indeed did not find that there was in fact any direct relationship between Kustsammlungen and the

the merits of that issue. Irrespective of its relationship with the GDR government, however, it is undisputed that Kunstsammlungen is a discrete legal entity engaged solely in the operation of an art museum, a function completely foreign to the traditional business of sovereign government. Like other museum enterprises, it maintains museum buildings and looks after the art collections they house; purchasing, selling, exchanging, lending and borrowing paintings and art objects, planning and conducting exhibitions and lectures, publishing catalogues and art books. It seems ludicrous to suggest that an entity engaged in such nongovernmental functions should be vested with the privileges and burdened with the infirmities of sovereignty, merely because it is related in some degree to an unrecognized foreign government.[11]

In short, because the unrecognized GDR government is itself not the nominal plaintiff here; because the plaintiff

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GDR government. It concluded only that the entity was nevertheless "an integral part of the central government" because (a) the GDR constitution and laws provided for a system of indirect controls by that government over local governments and enterprises, (b) the financing of Kunstsammlungen, albeit indirectly, depended on appropriations which that government made to the local political subdivisions of the State, and (c) under East German law Kunstsammlungen property was designated "people's property", rather than private property of the institution (*infra*, pp. 12a-14a).

[11] We know of no case where such an enterprise, however closely related to government, has been granted sovereign immunity or (except for the decisions below) barred from suing. On the contrary, several decisions strongly suggest that enterprises engaged in activity which is not traditionally the business of government, even though agencies of unrecognized governments, should not be denied the right to sue. See *Russian Volunteer Fleet* v. *United States*, 282 U.S. 481 (1931); *United States* v. *The Home Insurance Co.*, 89 U.S. ((22 Wall.) 99 (1875); *Amtorg Trading Corp.* v. *United States*, 71 F.2d 524 (C.C.P.A. 1934); *Amtorg Trading Corp.* v. *New York Indemnity Co.*, 256 N.Y. 671 (1931); *Upright* v. *Mercury Business Machines Co.*, 13 A.D. 2d 36, 39 note, 41 (1st Dep't 1961).

is Kunstsammlungen, an entity engaged in activities which are far removed from the usual affairs of government; and because preventing it from suing to recover property stolen from it poses grave questions of due process: because of all these factors, the doctrine barring suit in our courts by unrecognized governments should certainly not have been applied here, whatever justification there may be for its use in other cases. The decisions below are a miscarriage of justice, which we respectfully submit this Court should set right.

II

The holding that Kunstsammlungen may not sue violates the 1923 treaty provisions guaranteeing German juristic entities access to the courts of the United States and is in conflict with decisions of this Court.

Certiorari should be granted here also because the decisions below, in refusing to honor provisions of the 1923 Treaty between the United States and Germany, disregarded and erroneously construed decisions of this Court.

Article XII of the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany (44 Stat. 2132 [1927], T.S. No. 725)[12] directs that juristic persons organized under the laws of each of the contracting powers "shall enjoy free access to the courts of law and equity" of the other "for the prosecution . . . [and] for the defense of rights in all the degrees of jurisdiction established by law".[13]

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[12] Article XII is printed as Appendix A, *infra*, p. 1a.

[13] Although the English text reads, "[l]imited liability and other corporations and associations, whether or not for pecuniary profit"; the German text is, "Juristische Personen des Privatrechts mit oder ohne Haftungseinschraenkung" ("Juristic persons under civil

The executive branch has consistently taken the view, and this Court has held, that the 1923 Treaty survived the war and remains applicable to the area of East Germany. *Zschernig* v. *Miller,* 389 U.S. 429, 449 (1968) (Harlan, J. concurring); *Clark* v. *Allen,* 331 U.S. 503, 513-14 (1946).

Although Kunstsammlungen is an entity within the scope of Article XII, the district court refused to grant it access to our courts because, since (as the court found) it was an "arm" of the GDR government, enforcement of the Treaty mandate "would be highly inconsistent with expressly formulated national policy" (*infra,* p. 15a). And *Clark* v. *Allen, supra,* the district court said, "clearly indicated that our courts should not enforce treaty provisions where to do so would defeat our Government's foreign policy objectives" (*infra,* p. 15a).

Aside from the fact, as we have shown in Point I, that the executive's nonrecognition "policy objectives" could not possibly be defeated by permitting Kunstsammlungen to sue to recover the Duerer paintings, the 1923 Treaty provisions may not so cavalierly be ignored. As this Court has repeatedly held, treaty obligations are "the law of the land", *Foster* v. *Neilson,* 2 Pet. 253, 314 (1829), and once undertaken they become "compulsory upon all courts of the United States", *Bell* v. *Clark,* 437 F.2d 200, 203 (4th Cir. 1971); see also, *Hines* v. *Davidowitz,* 312 U.S. 52 (1941); *Missouri* v. *Holland,* 252 U.S. 416 (1920). Refusal to enforce Article XII might be justified on a showing that the

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law with or without limited liability"). The Treaty provisions are thus applicable to all juristic entities. See Restatement (Second), Foreign Relations Law § 147, Comment d(i) at 454 (1965).

Article I of the Treaty similarly provides:

> "The nationals of each High Contracting Party shall enjoy freedom of access to the courts of justice of the other on conforming to the local laws, as well for the prosecution as for the defense of their rights, and in all degrees of jurisdiction established by law."

Article was suspended, terminated or modified; or, as reasonably interpreted, inapplicable to instrumentalities of an unrecognized government. But there was no such showing here; and the decisions below do not depend on any such finding.

The *dictum* in the *Clark* v. *Allen* opinion, 331 U.S. at 508-09, on which the district court relied (*infra*, p. 15a), certainly does not sanction disregard or suspension of treaty provisions by reason of Presidential (let alone State Department) pronunciamentos, at least in conditions short of wartime emergency. Treaty provisions are binding as a consequence of joint action by the President and the Senate, and they may not be suspended, terminated or otherwise abrogated by declaration of the President alone. And Justice Douglas never suggested that the courts' duty to enforce treaty provisions could be made to depend on the vagaries of Presidential or State Department policy. He was deciding only the issue of what effect war has on treaty obligations, and in the *dictum* in question he merely summarized the view Judge Cardozo had expressed on that limited question in *Techt* v. *Hughes*, 229 N.Y. 222 (1920), *cert. denied* 254 U.S. 543 (1920), which (as Justice Douglas said) "we believe to be the correct one".[14]

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[14] The State Department expressed the view below that although the 1923 Treaty still applies to the area of East Germany, Article XII does not require that an instrumentality of the GDR government, regardless of its juridical form under the laws of East Germany, be permitted to sue in United States courts. Although State Department views on treaty interpretation are entitled to consideration, they certainly are not binding on the courts; and the weight accorded them will vary depending on the extent to which the question in issue affects the conduct of international affairs. See Restatement (Second), Foreign Relations Law § 152, Comments a to c (1965); Moore, *The Role of the State Department in Judicial Proceedings*, 31 Fordham L.Rev. 277, 293-94, 299 (1962). There was no showing that the question in this case had more than the slightest effect, if any at all, on international relations.

III

The holding refusing to permit Kunstsammlungen to sue in light of the Executive's position that the USSR government was the sovereign power in East Germany and the GDR government merely its agent incorrectly decided an important question of federal law.

We argued below, in the alternative, that since the executive branch regarded the USSR government as the sovereign power in East Germany and the GDR government as merely its instrumentality, Kunstsammlungen, even though it were found to be an "arm" of the GDR government, was nevertheless entitled to sue nevertheless as an agency, albeit indirectly, of the *recognized* USSR government. The district court ignored our argument. The court of appeals rejected it (*infra,* p. 5a).

There is no doubt that our executive took the view that "sovereign power in East Germany has [since 1945] been exclusively exercised by the Soviet Union through its agency or instrumentality, the government of East Germany. . . ." *Carl Zeiss Stiftung* v. *V.E.B. Carl Zeiss, Jena,* 293 F.Supp. 892, 912 (S.D.N.Y. 1968), *aff'd.,* 433 F.2d 686 (2d Cir. 1970), *cert. denied,* 403 U.S. 905 (1971); see also, *Upright* v. *Mercury Business Machines Co.,* 13 A.D.2d 36, 42, 213 N.Y.S.2d 417, 423 (1st Dep't 1961); *Contemporary Practice of the United States Relating to International Law,* 57 Am. J. Int'l L. 403, 410 (1963); Department of State Background Notes, East Germany (Soviet Zone), Department of State Publication 7957 (January 1971), p. 7.

That was the view also of the British government before it recently recognized the GDR government as sovereign. *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*

[1966] 2 All E.R. 536, 578 (H.L.). And the House of Lords, in the *Zeiss* case just cited, adopted the very same position we urged below. It held that the political subdivision of the GDR government involved in that case, the Council of Gera, must be deemed an organ established under the laws not of the unrecognized GDR government, but rather of the recognized USSR government, acting through the GDR regime as its subordinate agent (*Id.* at 548). Similarly, Kunstsammlungen, if indeed it be a government agency, must also be regarded an agency of the USSR government.

Admittedly the position which we assert is founded on a fiction, even as was the House of Lords ruling. But accepting it would permit the courts to assure Kunstsammlungen an adjudication of its property rights without having to confront the delicate international and constitutional law questions which application of the nonrecognition doctrine presents. And the fiction certainly is no more repugnant than the fictions inherent in the views that the GDR regime still remains today a non-legitimate government and that to permit Kunstsammlungen to sue will embarrass the executive. Moreover, in light of the unprecedented and confusing posture of post-war Germany, the position we urge would furnish a most sensible method for resolving the thorny problems its status poses. To paraphrase a comment on somewhat similar questions presented in the *Zeiss* cases: "[T]he most desirable result would be that both parties [the East German party, sought to be barred because of the nonrecognition of the GDR government, and the West German party] have an unrestricted opportunity to present their case on the merits, and surely that could not be a disaster for anyone." Comment, *A Divided Country in Foreign Courts—Recent Litigation Involving Germany's Legal Status and the Zeiss Stiftung*, 65 Mich. L. Rev. 924, 943 (1967). Justice and fairness plainly commend that course.

CONCLUSION

For the foregoing reasons the petition for a writ of certiorari should be granted.

Respectfully submitted,

HARRY I. RAND
Attorney for Petitioner

LAWRENCE M. KAYE
BOTEIN, HAYS, SKLAR & HERZBERG
Of Counsel

September, 1973.

APPENDIX A

Article XII of the Treaty Between the United States and Germany of Friendship, Commerce and Consular Right, December 8, 1923, 44 Stat. 2132 (1927), T. S. No. 725 reads, as follows:

ARTICLE XII.

Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial, of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party provided that they pursue no aims within its territories contrary to its laws. They shall enjoy free access to the courts of law and equity, on conforming to the laws regulating the matter, as well for the prosecution as for the defense of rights in all the degrees of jurisdiction established by law.

The right of such corporations and associations of either High Contracting Party so recognized by the other to establish themselves within its territories, establish branch offices and fulfill their functions therein shall depend upon, and be governed solely by, the consent of such Party as expressed in its National, State, or Provincial laws.

APPENDIX B

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 748–749—September Term, 1972.

(Argued April 24, 1973 Decided April 25, 1973.)

Docket Nos. 72-2305–2306

KUNSTSAMMLUNGEN ZU WEIMAR,

Plaintiff-Appellant,

v.

EDWARD I. ELICOFON,

Defendant-Appellee.

FEDERAL REPUBLIC OF GERMANY,

Plaintiff-Appellee,

v.

EDWARD I. ELICOFON,

Defendant-Appellee,

ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Plaintiff-Intervenor-Appellee,

KUNSTSAMMLUNGEN ZU WEIMAR,

Proposed Plaintiff-Intervenor-Appellant.

Before:

BREITENSTEIN*, KAUFMAN and MANSFIELD,

Circuit Judges.

Appeals from an order and judgment of the United States District Court for the Eastern District of New York, Hon. Jacob Mishler, *Chief Judge*, denying appellant's motion to intervene and dismissing appellant's separate complaint in actions seeking recovery of two paintings allegedly stolen from a castle in Germany in 1945.

Affirmed.

HARRY I. RAND, Esq., New York, N.Y. (Lawrence M. Kaye, Esq., Botein, Hays, Sklar & Herzberg, New York, N.Y., on the brief), *for Proposed Plaintiff-Intervenor-Appellant.*

RICHARD W. HULBERT, Esq., New York, N.Y. (Cleary, Gottlieb, Steen & Hamilton, New York, N.Y., on the brief), *for Defendant-Appellee Elicofon.*

ALBERT D. JORDAN, Esq., New York, N.Y. (Elliot Paskoff, Esq., Horst Kurnik and Valicenti, Leighton, Reid & Pine, New York, N.Y., on the brief), *for Defendant-Appellee Federal Republic of Germany.*

HERBERT STRONG, Esq., New York, N.Y., *for Plaintiff-Intervenor-Appellee Duchess of Saxony-Weimar.*

* Of the United States Court of Appeals for the Tenth Circuit, sitting by designation.

PER CURIAM:

On January 27, 1969, the Federal Republic of Germany brought suit in the district court for the Eastern District of New York against Edward Elicofon, a New York resident, to recover two valuable paintings by the renowned artist Albrecht Duerer, alleged to have been stolen in 1945 from Schwartzburg Castle in Germany during the American Occupation. The Federal Republic asserts that the paintings, executed in the year 1499, are the property of the German people, having been in the possession of a state museum at the time of theft, and that it is the only government that may properly represent the German people in an American court. On March 25, 1969 the Grand Duchess of Saxony-Weimar was granted leave to intervene, based on a claim that the Duerer masterpieces have been part of the collection of the Grand Duke of Saxony-Weimar since 1824 and that title to the paintings rests in her through an assignment from the Grand-Duke.

On April 14, 1969, the Kunstsammlungen Zu Weimar (Weimar Art Collection), an entity existing under the laws of the German Democratic Republic, sought leave to intervene, and brought a separate action against Elicofon for return of the paintings. The Kunstsammlungen asserts that it has custody over the art collection from which the paintings allegedly were stolen and is, accordingly, the rightful owner of the Duerer works.

The motion to intervene was opposed by all parties, and Elicofon moved to dismiss the separate action brought against him by the Kunstsammlungen Zu Weimar. In essence the Federal Republic of Germany, the Grand Duchess and Mr. Elicofon took the position that the Kunstsammlungen Zu Weimar is an arm and agency of the German Democratic Republic, a government not recognized by the United States, and as such is without standing to sue in

American courts. In addition, the United States Department of Justice, acting in behalf of the Department of State, filed a "Suggestion of Interest of the United States" indicating the following.

> 1. The United States Government does not recognize the East German regime.
>
> 2. The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as the representative of the German people in international affairs.
>
> 3. The United States Government recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interests.

In an opinion filed on June 25, 1970, Chief Judge Mishler ruled that the German Democratic Republic would not be entitled to sue in its own right to recover the two Duerer paintings. Following an evidentiary hearing, Chief Judge Mishler ruled, in an opinion filed September 26, 1972, that the Kunstsammlungen Zu Weimar was an arm and agency of the German Democratic Republic and, as such, was barred from suit. Accordingly, leave to intervene was denied and the motion to dismiss made by Elicofon was granted. This appeal followed.

We affirm for the reasons given in Chief Judge Mishler's two opinions, reported at —— F. Supp. —— (E.D.N.Y. 1973). Moreover, we find no merit in the argument advanced here that the Kunstsammlungen Zu Weimar is an arm of the government of the Union of Soviet Socialist Republics and therefore an agency of a recognized government previously granted litigant status.

APPENDIX C

FEDERAL REPUBLIC OF GERMANY v. ELICOFON
Cite as 336 F.Supp. 747 (1972)

FEDERAL REPUBLIC OF GERMANY,
Plaintiff,
v.
Edward I. ELICOFON, Defendant,
Elisabeth Mathilde Isidore Erbgrossherzogin von Sachsen-Weimar-Eisenach (Grand Duchess of Saxony-Weimar), Plaintiff-Intervenor.

KUNSTSAMMLUNGEN zu WEIMAR,
Plaintiff,
v.
Edward I. ELICOFON, Defendant.
Nos. 69-C-93, 69-C-370.

United States District Court,
E. D. New York.
June 25, 1970.
Supplemental Opinion Sept. 25, 1972.

Albert D. Jordan, Valicenti, Leighton, Reid & Pine, New York City, Counsel to Horst Kurnik, for Federal Republic of Germany.

Richard W. Hulbert, and George J. Grumbach, Jr., Cleary, Cottlieb, Steen & Hamilton, New York City, for Edward I. Elicofon.

Herbert J. Strong, Scribner & Miller, New York City, for Elisabeth Mathilde Isidore, etc.

Harry I. Rand, Botein, Hays, Sklar & Herzberg, New York City, for Kunstsammlungen zu Weimar.

James D. Porter, Asst. U. S. Atty., Robert A. Morse, U. S. Atty., E. D. New York, Brooklyn, N. Y., for the United States.

MEMORANDUM OF DECISION AND ORDER

MISHLER, Chief Judge.

On January 27, 1969, the Federal Republic of Germany began action number 69-C-93 against Edward I. Elicofon for the return of two paintings believed to be in defendant's possession. The paint-

ings, portraits of Hans and Felicitas Teicher, were allegedly painted by the celebrated German artist Albrecht Duerer in or about 1499. The complaint asserts that the paintings became part of an art collection in Weimar in 1824 and were placed in a museum which since 1921 has been called "Staatliche Kunstsammlungen"; that during the occupation of Weimar (currently in East Germany) by the United States armed forces and prior to July 1, 1945, the paintings were stolen from the Castle Schwartzburg, where they had been placed for safekeeping; and that defendant, directly or indirectly, acquired the paintings from the thief.

Plaintiff claims the right to custody and possession of the paintings by reason of the Joint Declaration of Three Allied Powers of September 18, 1950, which, with the United States as a participant, declared that the Federal Republic is the only government which may represent the German people.[1]

Defendant denies the allegations of the complaint, including the theft, and affirmatively claims title to the paintings through purchase in good faith for value in accordance with the laws of Germany.[2]

By order dated March 25, 1969, Elisabeth Mathilde Isidore Erbgrossherzogin Von Sachsen-Weimar-Eisenach (hereinafter the Grand Duchess) was granted leave to intervene. She alleged that the paintings have been part of the Grand Ducal collection since 1824 and asserts title to the paintings through assignment from the Grand Duke of Saxony-Weimar on August 8, 1968.

On April 14, 1969, the Kunstsammlungen Zu Weimar (hereinafter Weimar Art Collection), an entity existing under the laws of the German Democratic Republic (hereinafter G.D.R.) and having custody over the art collection from which the paintings in suit were allegedly stolen, both moved to intervene in 69–C–93, Fed.Rules Civ.Proc. 24(a)(2), and brought a separate action, 69–C–370, against Edward I. Elicofon for return of the paintings. The Weimar Art Collection alleges that it owned the paintings at the time of the theft.

The Federal Republic, the Grand Duchess, and Elicofon all oppose the Weimar Art Collection's application to intervene. Elicofon has, in addition, moved to dismiss the Weimar Art Collection's complaint in 69–C–370. Should his motion to dismiss be denied, however, Elicofon asks that 69–C–93 and 69–C–370 be consolidated.

The motions by the Weimar Art Collection to intervene in 69–C–93 and by Elicofon to dismiss the complaint in 69–C–370 or if that is unsuccessful to consolidate 69–C–93 and 69–C–370 are currently before the court.

The Federal Republic takes the position, shared by the Grand Duchess and Elicofon, that the Weimar Art Collection is an instrumentality of the G.D.R., a government not recognized by the government of the United States, and as such lacks standing to sue in United States courts. The Federal Republic makes the additional argument that it adequately represents the interests of the Weimar Art Collection in 69–C–93. In further support of his motion to dismiss the complaint in 69–C–370, Elicofon asserts that as a citizen of a country whose government is not recognized by the United States, the Weimar Art Collection is not a citizen or subject of a foreign state within the meaning of 28 U.S.C. § 1332(a)(2) and, therefore, that the court lacks jurisdiction over the subject matter of the action.

The Weimar Art Collection differs with the assertions of the other parties

1. Paragraph 9 of the complaint alleges:

> "At the time of their theft, the Duerer Paintings were the property of the Weimar Musuem which, in turn, belonged to the State of Thuringia, one of the Federal States of the German Reich, of which plaintiff is the only lawful and recognized successor."

2. Other affirmative defenses not relevant to the issues before the court are asserted.

concerning its status. It alleges that by virtue of a decree of the Minister of Culture of the G.D.R. dated April 14, 1969 and made retroactive to January 1, 1969 it is a juristic entity independent of the government and possesses the capacity "to enter into contracts, to acquire and dispose of property and to sue in its own name." *Affidavit of Manfred Hofmann*, at par. 10. The Weimar Art Collection argues, therefore, that it has standing to bring suit in this court regardless of the position which this court may take on the question of whether the G.D.R. itself could sue.

The parties have filed numerous and voluminous affidavits and memoranda in support of their various positions. In addition, the United States Department of Justice, acting on behalf of the Department of State, filed the following "Suggestion of Interest of the United States":

1. The United States Government does not recognize the East German regime.

2. The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as the representative of the German people in international affairs.

3. The United States Government recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interests.

It is apparent that notwithstanding the position of the Weimar Art Collection, the question of whether a government not recognized by the United States would have standing to bring an action like the one at bar is of central importance to the resolution of the motions before the court. It is conceded by the parties that a determination favorable to the unrecognized government would establish the standing of the Weimar Art Collection in this litigation without regard to its claim of independence of the government of the G.D.R.

Survey of the Case Law

Virtually all of the courts which have had occasion to comment on the standing of unrecognized governments to sue in American courts have stated quite flatly that such governments lack standing to sue. See S. Lubman, The Unrecognized Government in American Courts; Upright v. Mercury Business Machines, 62 Colum.L.Rev. 278 (1962). Two grounds have been offered in support of this conclusion. At least one court has reasoned that the right of foreign governments to sue in American Courts is a function of the comity which exists between friendly nations and that this comity is absent between the United States and a government nor recognized by it. Russian Socialist Federated Soviet Republic v. Cibrario, 235 N.Y. 255, 139 N.E. 259 (1923). The great majority of the courts which have taken a position on the issue have based their opposition to suits by unrecognized governments on the theory that to allow an unrecognized government to sue in American courts would overrule the act of the President in withholding recognition from the plaintiff government, a power which is exclusively his under the Constitution. *See e. g.* The Penza, 277 F. 91 (E.D.N.Y.1921); The Rogdai, 278 F. 294 (N.D. Cal.1920).

Absent from most of these cases is a thorough analysis of the considerations which have motivated this rather consistent expression of judicial opinion. The correctness of the rule denying litigant status to non-recognized governments seems to have been taken for granted in many cases, and little attempt has been made to examine the nature of the presidential act of refusing to recognize a government. Some courts, moreover, have repeated the rule while reaching results which seem to question its validity. In Wulfsohn v. Russian Socialist Federated Soviet Republic, 234 N.Y. 372, 138 N.E. 24 (1923), appeal dismissed, 266 U.S. 580, 45 S.Ct. 89, 69 L.Ed. 451 (1924), the same court which some months later de-

cided the now famous *Cibrario* case upheld the claim of Soviet Russia, at that time not recognized by the United States, to sovereign immunity from suit. The court stated that the existence of a government is a fact not dependent upon recognition and that a foreign sovereign cannot be made subject to our laws without its consent.[3] *Cf.* Bank of China v. Wells Fargo Bank & Union Trust Co., 92 F.Supp. 920 (N.D.Cal.1950), appeal dismissed, 190 F.2d 1010 (9th Cir. 1951), judgment entered, 104 F.Supp. 59, 66 (N.D.Cal.1952), modified, 209 F. 2d 467 (9th Cir. 1953); Banque de France v. Equitable Trust Co., 33 F.2d 202 (S.D.N.Y.1929), aff'd, 60 F.2d 703 (2d Cir. 1932); Russian Reinsurance Co. v. Stoddard, 240 N.Y. 149, 147 N.E. 703 (1925). And in United States v. Home Insurance Co., 89 U.S. (22 Wall.) 99, 22 L.Ed. 816 (1875) and Amtorg Trading Corp. v. United States, 71 F.2d 524 (C.C.P.A.1934), federal courts permitted suit by corporations associated with unrecognized governments. *See also* Upright v. Mercury Business Machines Co., 13 A.D.2d 36, 213 N.Y.S.2d 417 (1st Dep't 1961) (dictum). In *Home Insurance*, *supra*, the Supreme Court sustained the standing to sue of two corporations created by the Georgia legislature at a time when Georgia was in armed rebellion against the Union. The court reasoned that the Georgia legislature had a de facto if not a de jure existence and that enactments of the legislature which were neither hostile to the Union nor in conflict with the Constitution of the United States had the same validity as if they had been enactments of legitimate legislatures. In *Amtorg*, *supra*, the Court of Customs and Patent Appeals allowed a New York corporation which was wholly owned by Soviet Russia to challenge an import duty. The court based its decision on the New York citizenship of the plaintiff corporation and indicated that since its equity jurisdiction was not invoked and no matter of public policy was involved the court would not pierce the corporate veil.

The Sabbatino Case

It is against this background that this court interprets a recent Supreme Court decision as having invited a reexamination of the rule denying unrecognized governments access to our courts. In Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964), the Supreme Court was faced with the question of whether the government of Cuba, a government recognized by but having no formal diplomatic relations with the United States, could sue in United States courts. In upholding the status of the Cuban government as a litigant, the Court commented:

> The doctrine that nonrecognition precludes suit by the foreign government in every circumstance has been the subject of discussion and criticism . . . . In this litigation we need intimate no view on the possibility of access by an unrecognized government to United States courts, except to point out that even the most inhospitable attitude on the matter does not dictate denial of standing here. 376 U.S. at 411, n. 12, 84 S.Ct. at 931, n. 12.

The Court, moreover, illuminated a path for the reexamination of the rule to follow. The Court said at pp. 410–411, 84 S.Ct. at 931:

> It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater un-

3. In Russian Socialist Federated Soviet Republic v. Cibrario, *supra*, the New York Court of Appeals elaborated somewhat on its decision in *Wulfsohn*:

> Nor is anything here decided inconsistent with Wulfsohn v. Soviet Republic (*supra*). Upon the facts in that case, if the defendant was not an existing government, it might not be sued. There was no party before the court. If it were, as alleged and admitted, the same result followed not because of comity, but because an independent government is not answerable for its acts to our courts. 235 N.Y. at 263, 139 N.E. at 262.

friendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control. . . . Political recognition is exclusively a function of the Executive. The possible incongruity of judicial "recognition," by permitting suit, of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken.

Analysis in Light of the Sabbatino Case

[1] The Supreme Court's elucidation of the presidential act of nonrecognition as manifesting the unwillingness of the United States to acknowledge that a government speaks as the sovereign authority for the territory it purports to control is productive of a rule which would deny to the G.D.R. the right to bring suit in our courts in an action like the one at bar. Nonrecognition of a government, under the Supreme Court's analysis, is indicative of the refusal of the United States to regard that government as the legitimate spokesman in international affairs for the people it purports to govern. Nonrecognition, therefore, negatives the very posture which the G. D.R. would necessarily have to assume had it brought suit for return of the paintings. A claim of title to the paintings by the G.D.R. would, by definition, be a claim on behalf of the people it purports to govern.

[2, 3] Any attempt, moreover, to characterize such a suit as involving purely private rights and therefore outside the realm of international affairs unduly limits the scope of international affairs. It is a mistake to restrict the label of international affairs to negotiations between governments concerning subjects in the nature of national defense and foreign cultural exchanges. A government is in every sense of the word acting in international affairs when it seeks the aid of a foreign government in an attempt to vindicate the private rights of specific citizens or of its citizenry as a whole. *See* Agreement with Yugoslavia on Claims of United States Nationals, [1965] 1 U.S.T. 1; Banco Nacional de Cuba v. Sabbatino, *supra*, at 431–432, 84 S.Ct. at 942. A decision by this court permitting the G. D.R. to bring such a suit would be the equivalent of an assertion by the court that it acknowledges the right of that government to represent the people of East Germany in international affairs. A determination of that kind would be inconsistent with the presidential denial of recognition to the G.D.R. and thus be an unconstitutional encroachment upon the power of the President.[4]

It is clear, at this point, that the question of whether the Weimar Art Collection has standing to maintain suit in this court for return of the Duerer paintings cannot be answered without a prior determination of the relationship of the Collection to the G.D.R. The Weimar Art Collection has consistently maintained that it is a juristic entity independent of the government and has supported its contentions with voluminous affidavits. The other parties to the action have just as consistently and with similar supporting papers taken a contrary position. The court is reluc-

4. It is unclear whether this reasoning supports a rule invariably denying standing to unrecognized governments. There may be special circumstances in which action by the President can be interpreted as creating an exception to the rule. For example, it may be argued that the act of the Executive in permitting American nationals to engage in commercial transactions with unrecognized governments or their instrumentalities carries with it a grant to those governments or instrumentalities of standing to litigate claims arising out of those transactions in United States courts. See Upright v. Mercury Business Machines Co., *supra*; S. Lubman, The Unrecognized Government in American Courts: Upright v. Mercury Business Machines, *supra*.

tant, however, to decide the complex issues of law and fact involved in this critically important question on the uncross-examined assertions of even the distinguished experts marshalled by the various parties. A hearing on these issues is required if the court is to avoid a determination based upon politically informed notions concerning property rights in the G.D.R.

If, after a hearing, it is found that the Weimar Art Collection is an arm or instrumentality of the G.D.R., the court will have no choice but to hold that it too is barred from bringing suit. On the other hand, facts may be developed at the hearing which indicate that the Weimar Art Collection is sufficiently independent of the G.D.R. to be entitled to be free of the latter's disability.

The parties are therefore directed to appear by their attorneys on July 2, 1970 at 11:30 A.M. to set a date for a hearing and to specify the issues of law and fact to be heard.

The Court also reserves decision on Elicofon's claim that the court lacks subject matter jurisdiction in 69–C–370 and on the Federal Republic's contention that it adequately represents the interests of the Weimar Art Collection in 69–C–93.

It is so ordered.

SUPPLEMENTAL OPINION

The memorandum of decision of this court dated June 25, 1970 directed an evidentiary hearing to determine whether the Weimar Art Collection is an arm or instrumentality of the GDR. The resolution of the issue is determinative of the motion of the Weimar Art Collection to intervene in 69–C–93 and of the defendant Elicofon's motion to dismiss the complaint in 69–C–370. The Weimar Art Collection submitted the affidavits of Manfred Hofmann and Heinz Puschel in support of its motion to intervene and in opposition to the motion to dismiss its complaint. The affidavits of Andreas F. Lowenfeld were submitted for Elicofon and Federal Republic of Germany. Subsequent to the filing of the memorandum of decision the Weimar Art Collection deposed Dr. Walther Scheidig, the former director of the Weimar Art Collection, Dr. Gerhard Pommeranz-Liedtke, the present director, Dr. Bernard Graefrath and Dr. Heinz Puschel.[1] The other parties were afforded full right of cross-examination. The testimony of Dr. Sigfried Mampel was offered at an evidentiary hearing before the court by the Federal Republic of Germany. The Federal Republic of Germany commenced this action (69–C–93) on January 27, 1969.

On April 14, 1969, the Minister for Culture and Education of the GDR issued an order granting the Weimar Art Collection "the status of a juristic person" and declaring "it shall be represented in legal matters through the Director of the Weimar Art Collections." It further directed:

> "The Statut (articles or by-laws) of the Weimar Art Collections is to be prepared by the Director and requires confirmation by the competent local governmental authorities."

The order was made retroactive by its terms to January 1, 1969. The statut was signed by the Director on April 16, 1969 and confirmed by the Lord Mayor of the City of Weimar on April 17, 1969. A copy of the statut is appended to this memorandum of decision.

Prior to World War I, Weimar Castle, which included the Weimar Art Collection, was the property of the Grand Duke Wilhelm Ernst of Saxony. On April 30, 1920, Federal German law created various states. One of the states, Land Thüringen, comprised seven political subdivisions, including the territory of Weimar, in which the museum was located. Land Thüringen succeeded to the rights formerly held by the territory of Weimar which included the museum and

1. The State Department denied applications for visas for the purpose of entering the country to testify. Thereupon the parties agreed to depositions of these witnesses.

the castle in which the museum was located. During the reign of the Third Reich the German Reichstag enacted a law providing for the transfer of the sovereign rights of the various states to the Central Government, the German Reich. The Weimar Art Collection was then known as the Staatliche Kunstsammlungen zu Weimar ("Governmental Art Collections in Weimar").

After the defeat of Germany in World War II, on June 5, 1945 the four powers, *i. e.*, the United States of America, the United Kingdom, the USSR and the French Republic entered into an agreement assuming all the powers possessed by the German Government and any state, municipal, or local government, or authority within Germany. The United States armed forces withdrew from Weimar on or about July 1, 1945, when the USSR became the occupying power. The Soviet Military Administration issued orders giving possession of sequestered assets to the Länder or States within the Soviet zone. On October 7, 1949, the USSR proclaimed the establishment of the German Democratic Republic in the zone occupied by the USSR. Länder were dissolved as political units by the Volkskammer (People's Chamber of the GDR) in 1952 and were formally eliminated by a law enacted in 1958. The Weimar Art Collection under the name Staatliche Kunstsammlungen zu Weimar until 1966 and thereafter under the name Kunstsammlungen zu Weimar, until the issuance of the order of the Minister for Culture and Education was the property of the GDR and under the direct control of the Minister of Culture and Education.

The Director of the Weimar Art Collection appears to have broad administrative powers over the museum. The statut recited that he ". . . . is empowered to make decisions, on his own responsibility . . ." and ". . . to conclude . . . agreements, to acquire, administer, utilize and also dispose of the property" of the institution. The Director is appointed by the Mayor of the City of Weimar and subject to dismissal by him. The City of Weimar has limited power to deal with local problems, i. e., parks, streets, garbage disposal. It is subject to control by the Bezirke of Erfurt which in turn is responsible to the central government.[2]

The concept of a single government with levels of authority reaching into every locality through all areas of social, economic and political life is one of the basic tenets of the GDR. The principle of political homogeneity is incorporated in the GDR Constitution of 1968. The Volkskammer or "People's Chamber" is the source of power in the German Democratic Republic.[3] The local representative bodies are organs of the Volkskammer[4] as are enterprises such as the Weimar Art Collection.[5]

2. The law enacted on July 29, 1952 in the Volkskammer eliminated "länder" and substituted fourteen districts or counties called Bezirke. The law states in part: "• • • The effective guidance and control of the lower [State] instrumentalities by the higher ones • • • must be assured.

   Sec. 1(1) The Laender shall reconstruct their territories into Districts.

   (2) The demarcation of the Districts shall be arranged in such a way that it is adequate to the economic necessities and that the execution of all State tasks especially the effective guidance and control of the State instrumentalities in the communities is assured.

3. ARTICLE 48 of the Constitution states in part:

   (1) The People's Chamber is the supreme organ of state power in the German Democratic Republic. It decides in its plenary sessions the basic questions of state policy.

4. ARTICLE 81 of the Constitution states in part:

   (1) The local popular representative bodies are the organs of state power in the districts, regions, towns, municipal boroughs, local communities and associations of local communities, elected by citizens having the right to vote.

5. ARTICLE 41 of the Constitution states:

   The socialist enterprises, towns, local communities and associations of local communities are, within the framework of central state planning and management, self-responsible communities in which

Art Collections in Weimar of 4/14/69 (Legal Gazette II, # 31 p. 218 and on the Statutes of the Art Collections in Weimar approved by the Lord Mayor of Weimar dated 4/16/69."

(The correct date would be 4/17/69)

The property held by the museum is described as people's property. People's property is "nationally owned property of society as a whole" as defined in Article 10.[10] The museum cannot hold this property against the claim of people's property but only as its trustee.

The ownership of the paintings and works of art by the museum and its role as "bearer of rights" demonstrates the museum's role as an integral part of the central government rather than its independence from it.

[4] I find that the Weimar Art Collection was, prior to the April 14, 1969 order of the Minister for Culture and Education, performing a governmental function as an arm and agency of the GDR. It [illegible] form its educational and cultural activities. [illegible] ties [illegible] Article 37(2) [illegible] kanzlers [illegible] turnabout [illegible] The GDR exercised [illegible] control over the state power for [illegible] national [illegible] the [illegible] injustic [illegible] the museum by the order of April 14, 1969 of the Minister [illegible] Culture [illegible] the Volkskammer of the GDR. The Minister of Culture has the right to overrule the decisions of the Director under the Statute (a decision [illegible] Statute for the Interior of Culture), and indeed has the power to dissolve the [illegible] Weimar Art Collection is financed from funds granted by the City of Weimar from the Bezirke [illegible] Erfurt, which in turn receives funds from the central government and has power to control the largest purpose of this litigation. The acts of an unrecognized power are normally given effect where it pertains to rights within its own borders. We are not obliged to give effect to acts of non-recognized powers that grant rights here in derogation of the authority of the President of the United States in foreign affairs. Carl Zeiss Stiftung v. V.E.B. Carl Zeiss, Jena, 433 F.2d 636, 699 (2d Cir. 1970).

[6] The Weimar Art Collection argues that even if it is an arm or instrumentality of the GDR, it is still entitled to sue in our courts under Article XII of the Treaty with Germany of Friendship, Commerce and Consular Rights of December 8, 1923, 44 Stat. 2132 (1927), T.S.No. 725, which provides, in pertinent part, as follows:

> Limited liability and other corporations and associations, whether or not for pecuniary profit, which have been or may hereafter be organized in accordance with and under the laws, National, State or Provincial of either High Contracting Party and maintain a central office within the territories thereof, shall have their juridical status recognized by the other High Contracting Party, and may assert [illegible] pursue [illegible] Weimar Art Collection was [illegible] from [illegible] free access to the courts of law [illegible] Weimar on November 1, 1969 [illegible] prosecution [illegible] rights in the real and personal property [illegible] Collection. The instrument purporting [illegible] Weimar Art Collection [illegible] East German law, is entitled to free access to our courts.

[illegible] 1969 order [illegible] East German [illegible] Status is made based on the Order of the Ministry for Culture about the

10. Article 10 of the Constitution of the GDR reads as follows:

> (1) Socialist property is the property of the whole people or of social organizations. It is the basis for the development of the socialist community and for the welfare of the citizens.
>
> (2) Socialist property is protected by the state. It is the duty of all citizens to safeguard and increase socialist property.

Article 11 of the Constitution of the GDR reads as follows:

> (1) The economic system of the German Democratic Republic is based on the ownership of the means of production by the working people, and on the planned development of the economy in the interest of the working people.
>
> (2) The economic system of the German Democratic Republic serves the welfare of the people, the steady growth of the material and cultural standard of living of the working people, the free development of the personality, the safeguarding of peace and the prevention of exploitation of man by man.
>
> (3) The economic system of the German Democratic Republic is a unified system of socialist economy, which combines the advantages of socialist relations of production, the scientific-technical revolution and the socialist economic integration with the Union of Soviet Socialist Republics and the other socialist countries.
>
> (4) The responsibility of all leading organs as the principle of social organizations and citizens in the state and economy towards citizens is guaranteed by a system of reporting back.

The Official Explanation of Article 88 is the following:

> "At the same time, the principle of democratic centralism in the composition and structure of leadership of state and economy entails the duty in each instance to render account to the immediately superior organ, *all the way up to the central state organs*, which, in turn, must render account to the highest representative body, the Volkskammer. The control over implementation and the ensuing duty to render account of the execution of delegated tasks is an essential part of the actual governing of the socialist state."

8. The Law concerning the state budget

The decisions of the Supreme Court in Clark v. Allen, 331 U.S. 503, 67 S.Ct. 1431, 91 L.Ed. 1633 (1947), and Zschernig v. Miller, 389 U.S. 429, 88 S.Ct. 664, 19 L.Ed.2d 683 (1968), do not support the Weimar Art Collection's argument. The Court in *Clark* stated that while the events surrounding World War II did not necessarily suspend or abrogate the 1923 treaty, "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with enforcement of a treaty in whole or in part," Clark v. Allen, *supra* at 508–509, 67 S. Ct. at 1435. The Court in *Clark* found that the national policy, as expressed in the Trading with the Enemy Act, was not incompatible with the right of inheritance granted under Article IV of the treaty. *Zschernig* arose after the division of Germany was crystallized. While in a concurring opinion Justice Harlan expressed his belief that the treaty still applied to East Germany, the majority of the Court did not choose to rule on the continued validity of the treaty, but rather invalidated an Oregon escheat statute on the constitutional grounds of state intrusion into the federal domain of foreign affairs.

It is not necessary for this court to rule on the validity of the treaty as a whole in this case.[11] Even if the treaty as a whole applies to East Germany, the more important factor here is that the United States does not recognize the GDR as the government of East Germany. Furthermore, the Department of State has expressed its view that "Article XII of the 1923 Treaty does not require that the privilege of bringing suit be accorded to the East German regime or an agency or instrumentality of that regime, regardless of the juridical form which such agency or instrumentality may have under the laws of the East German regime." Letter from Carl F. Salans, Acting Legal Adviser, Department of State, to Harlington Wood, Jr., Assistant Attorney General, July 31, 1972, Appendix A to Memorandum on behalf of the United States. Thus, to enforce Article XII of the treaty would be highly inconsistent with expressly formulated national policy. To allow the Weimar Art Collection to intervene in this case would render our Government's non-recognition of the GDR a meaningless gesture. Such a holding would permit non-recognized governments to use our courts at will by creating "juridical entities" whenever the need arises. The Supreme Court in *Clark*, *supra* at 508–510, 67 S.Ct. 1431, clearly indicated that our courts should not enforce treaty provisions where to do so would defeat our Government's foreign policy objectives. I hold that Article XII of the 1923 treaty does not grant the Weimar Art Collection standing to intervene or sue in our courts.

The parties are directed to appear on the 29th day of September 1972, in courtroom No. 5, 10 A.M., to discuss the custody of the subject matter of the action pending a final determination of the issues. The parties shall not enter into any agreement affecting the custody of the paintings without approval of the court.

Motion by the Weimar Art Collection to intervene in 69–C–93 is denied. It is

So ordered.

The motion of the defendant Elicofon to dismiss the complaint in 69–C–370 is granted. The Clerk of the Court is directed to enter judgment in favor of the defendant Elicofon and against the plaintiff Kunstsammlungen zu Weimar dismissing the complaint.

STATUT
of the Weimar Art Collection

§ 1

Legal Status and Seat

(1) The Weimar Art Collection is a juristic entity. Its domicile is Weimar.

11. The United States, which has filed a suggestion of interest and memoranda opposing intervention by the Weimar Art Collection, considers that the 1923 treaty still applies to the area of East Germany.

(2) The Weimar Art Collection is subject to supervision by the Council of the City of Weimar.

§ 2

Tasks and Activities

(1) The Weimar Art Collection constitutes places of education and research in the sphere of science and arts. It preserves and cares for the works of architecture, painting, graphics, sculpture and arts and crafts of which it is in charge.

(2) In particular it is the responsibility of the Weimar Art Collection,

(a) to take expert care of the works of art,

(b) to take all measures for their preservation and care, their expert restoration and preservation in accordance with the latest scientific methods,

(c) to carry out scientific research and educational work, above all through exhibitions, through the issuance of scientific publications and catalogues, through conducted tours and lectures,

(d) to organize visitor publicity in cooperation with mass organizations and enterprises.

ENGLISH TRANSLATION

§ 3

Administration

(1) The Weimar Art Collection shall be administered by the Director who is responsible for all its activities. He acts in the name of the Weimar Art Collection and is empowered to make decisions, on his own responsibility, on the basis of the provisions and plans which apply to its activities, as to all matters concerning the Weimar Art Collection.

(2) In the event the Director is prevented [from doing so], the Art Collection is to be administered by a deputy appointed by the Director.

(3) For the fulfilment of the tasks imposed on the Art Collection any necessary actions shall be taken, rights acquired and obligations assumed. The Director of the Weimar Art Collection is in particular empowered

—to conclude relevant agreements;

—to acquire, administer, utilize and also dispose of the property;

—to prosecute any suits with respect to the property.

§ 4

Representation in Legal Matters

(1) The Weimar Art Collection shall be legally represented through the Director and, in the event of his being prevented [from doing so], through the deputy appointed pursuant to § 3.

(2) The Weimar Art Collection may also be represented by other members of the staff or such persons as shall act within the scope of powers of attorney given to them in legal matters. Such powers of attorney are to be made in writing and only by the Director.

(3) In accordance with appropriate provisions for this, financial transactions require the participation and counter-signature by the chief accountant of the Weimar Art Collection, and in case of his being prevented [from doing so], by his deputy.

§ 5

Board of Trustees

A board of trustees shall be established for the Weimar Art Collection for the purpose of advising on principal questions in its development. The chairman of the board is the Lord Mayor of the City of Weimar. He appoints the members of the board. The board of trustees shall be composed of eleven members. The board decides on its rules of procedure.

§ 6

Manner of Work

(1) The work of the Weimar Art Collection shall be performed in accordance with a long-term work plan, which shall be prepared by the Director. The plan shall make provision for scientific research connected with the works of

art, publicity and educational tasks, as well as conservation and care (restoration and preservation).

(2) The annual plan shall be prepared on the basis of the long-term work plan.

§ 7

Organization and Property

The Weimar Art Collection comprises:

(a) The Stadtschloss in Weimar as a building, that which is found in the historic rooms of the Stadtschloss, the Schlossmuseum and the gallery in the Schloss, as well as the restoration shops and other repair shops in the Stadtschloss, furthermore the former Landsmuseum on Karl-Marx-Platz Square as a building and art museum, the Schloss Belvedere as a building and art museum, the Kinsthalle on the Theaterplatz as a building and exhibition hall,

(b) as usufructary a part of the Orangerie in the Belvedere with the special collection of historic carriages as well as the ground floor of the Cranach-House on the Markt with the special equipment together with furniture and other objects of art

with all assets listed in the inventory of the Weimar Art Collection, including all rights and interests connected therewith.

§ 8

Opening Times and Conducted Tours

(1) With a view to making available the Weimar Art Collection to the general public, open tours for viewing the objects are on weekdays, Sundays and public holidays.

(2) For the purpose of studies, access will be granted, if previously arranged, outside open hours.

(3) Visitors to the Art Collection will be charged a fee which shall be fixed by the Director in accordance with existing regulations.

§ 9

Financing

(1) The budget of the Weimar Art Collection will be prepared by the Director in accordance with the tasks and the funds which are needed for the continued development of the Art Collection.

(2) Financing is effected.

(a) by way of income from admission fees and proceeds from sales;

(b) by way of subsidies granted from the budget of the City Council of Weimar.

§ 10

Appointment and Dismissal as well as Engagement and Discharge of Staff Members

(1) The Director of the Weimar Art Collection will be appointed and dismissed by the Lord Mayor of the City of Weimar.

(2) The members of the staff of the Art Collection will be engaged and discharged by the Director within the framework of the staff plan and relevant legal provisions.

§ 11

Publications

Publications of results of the work of the Weimar Art Collection shall be effected in accordance with relevant legal provisions and require approval by the Director.

§ 12

Effective Date

This Statut is effective as of January 1, 1969. Weimar, April 16, 1969

The Director

of the Weimar Art Collection
Sgd. Gerhard Pommeranz-Liedtke

The foregoing Statut of the Weimar Art Collection of April 16, 1969, is confirmed.

Weimar, April 17, 1969

The Lord Mayor of the City of Weimar
Sgd. Prof. Dr. habil. Paul Ullman

APPENDIX D

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals in and for the Second Circuit held at the United States Court House, in the City of New York on the eighteenth day of June one thousand nine hundred and seventy-three.

Present:

HON. IRVING R. KAUFMAN, Chief Judge,

HON. JEAN S. BREITENSTEIN,

HON. WALTER R. MANSFIELD,

Circuit Judges.

Kunstsammlungen Zu Weimar,

Docket Nos. 72-2305-6

Plaintiff-Appellant,

v.

Edward I. Elicofon,

Defendant-Appellee.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

A. DANIEL FUSARO
Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Court House, in the City of New York, on the eighteenth day of June, one thousand nine hundred and seventy-three.

Kunstsammlungen Zu Weimar,

Plaintiff-Appellant,

v.

Edward I. Elicofon,

Docket Nos. 72-2305-6

Defendant-Appellee.

A petition for a rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the appellant,

and no active circuit judge having requested that a vote be taken on said suggestion.

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied.

Judge Friendly and Judge Hays, did not participate in consideration of the petition.

A. DANIEL FUSARO
Clerk

COURT, U. S.
OCT 13

No. 73-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONER

HARRY I. RAND
Attorney for Petitioner
200 Park Avenue
New York, New York 10017

LAWRENCE M. KAYE
BOTEIN, HAYS, SKLAR & HERZBERG
Of Counsel

No. 73-492

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

SUPPLEMENTAL BRIEF FOR PETITIONER

Petitioner, Kunstsammlungen zu Weimar, respectfully submits this supplemental brief to call to the Court's attention the occurrence of events subsequent to the filing of its petition for a writ of certiorari which imply recognition of the German Democratic Republic by the United States.

It is undisputed that the decisions below were grounded solely on the nonrecognition of the GDR government; had recognition occurred prior to those decisions, Kunstsammlungen undoubtedly would have been permitted to sue. Further, where an unrecognized government (or, as here, an alleged instrumentality of the unrecognized government) has been denied access to our courts, its subsequent recognition by the executive at any stage of the appellate process cures its alleged incapacity to sue. *Republic of China* v.

Merchants' Fire Assur. Corp., 30 F.2d 278 (9th Cir. 1929); Restatement (Second), Foreign Relations Law § 107, Reporters' Note (1965).*

It is most significant therefore that developments which have occurred since the filing of our petition for certiorari strongly suggest recognition of the GDR by the United States. And this Court can and should take judicial notice of that recognition. *Republic of China* v. *Merchants' Fire Assur. Corp., supra;* cf. *United States* v. *Belmont,* 301 U.S. 324 (1937).

On September 18, 1973, the GDR and the Federal Republic of Germany were admitted to membership in the United Nations (N.Y. Times, September 19, 1973, at 1, col. 3). The United States government, having earlier joined in a quadripartite declaration of the Allied Powers pledging support for admission of the two German States and in the unanimous decision of the Security Council recommending their admission, now voted in favor of their acceptance as full-fledged members. These acts, we submit, constitute implied recognition of the GDR by our government.

Recognition is, of course, most frequently evidenced by formal declaration. But an express announcement is by no

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* This result is consistent with the long established principle that recognition retroacts to validate the acts of an existing although unrecognized foreign government [see, *e.g.*, *Oetjen* v. *Central Leather Co.*, 246 U.S. 297 (1918); *Underhill* v. *Hernandez,* 168 U.S. 250 (1897); *Luther* v. *Sagor* [1921] 3 K.B. 532; *Steingut* v. *Guaranty Trust Co. of New York,* 58 F.Supp. 623 (S.D.N.Y. 1944), *modified in part on other grounds, aff'd in part,* 161 F.2d 571 (2d Cir. 1947), *cert. dismissed,* 332 U.S. 753 (1947), *cert. denied,* 332 U.S. 807 (1947); Restatement (Second), Foreign Relations Law § 114 (1965)], including the commencement of an action prior to recognition [*State of Yucatan* v. *Argumedo,* 92 Misc. 547, 554 (Sup. Ct. N.Y. Co. 1915); see also, *Government of Mexico* v. *Fernandez* (1923), an unreported decision of the Supreme Court of Essex County, Massachusetts, discussed in Wright, *Suits Brought by Foreign States with Unrecognized Governments,* 17 Am. J. Int'l L. 742, 743-44 (1923)].

means essential. Recognition may also be implied, as Hackworth states, from any acts which manifest the intention to treat with the new state or government as such. 1 Hackworth, *Digest of International Law* 166 (1940). Implied recognition is, of course, a concept not new to the courts. *Republic of China* v. *Merchants' Fire Assur. Corp., supra; Government of Mexico* v. *Fernandez* (1923), unreported decision of the Supreme Court of Essex County, Massachusetts, discussed in Wright, *Suits Brought by Foreign States with Unrecognized Governments,* 17 Am. J. Int'l L. 742, 743-44 (1923); Restatement (Second), Foreign Relations Law § 104, Comment b (1965).

Article 4 of the United Nations Charter limits membership to "states". In sponsoring and voting in favor of the GDR's admission, therefore, our executive manifested an intention to accept the GDR as an entity possessing the requisite characteristics of statehood. And in approving the credentials of the GDR's delegation to the United Nations, he accepted the legitimacy of the government which had appointed that delegation.* See Restatement (Second), Foreign Relations Law § 105, Comment b (1965). Similarly, when Canada voted for the admission of Israel to the United Nations, it regarded that act "as having implied full recognition by the Government of Canada of the State of Israel". See Israeli Foreign Office letter, FO/I/(60), November 18, 1949.

Indeed, it has been suggested that admission to the United Nations *in itself* constitutes a collective recognition of the admitted state, binding upon all members: "... [T]he decision by which the General Assembly upon recommenda-

* Moreover, "[r]ecognition of new states usually carries with it recognition of the government of the state so recognized, since states can speak and act only through their governments". 1 Hackworth, *Digest of International Law* 167 (1940).

tion of the Security Council admits a community to membership in the Organization implies the recognition of this community as a state and . . . by ratifying the Charter or adhering to it in joining the Organization, a state transfers this competence to recognize a community as a state upon the Organization." Kelsen, *The Law of the United Nations* 79 (1950). See also, *U.S.S.R.* v. *Luxembourg and Saar Co.*, Ann. Dig., 1935-37, Case No. 33 (where a Luxembourg court held that nation committed to recognition of the Soviet government by reason of its admission to the League of Nations even though the Luxembourg delegate had not voted on the issue); Graham, *The League of Nations and the Recognition of States* 39-41 (1933); but see Restatement (Second), Foreign Relations Law § 105, Comment a (1965).

Our executive's intention to recognize the GDR was further underscored by the statement made, on the occasion of its admission to the United Nations, by our ambassador to that organization (a copy of which is annexed to this Brief). Ambassador Scali declared that the entry of "the two German states" into the United Nations was "a great symbolic act" and that the United States was "proud of the role which it has played in making this event a reality". Noting "with appreciation the declaration of the German Democratic Republic of its intention to abide by the principles of the United Nations Charter and to make its full contribution toward alleviating the world's economic, social and humanitarian ills", he expressed the hope that "the German Democratic Republic which occupies part of the territory of the former German Reich, will . . . recognize the just claims of those who suffered as a result of the actions of the Nazi government" and, together with the Federal Republic of Germany, join with the other member nations to resolve the world's pressing problems.

It would be difficult to conceive of a clearer expression of the intention to treat with the GDR as a sovereign in the community of nations. Were that not our government's purpose, it would have been a simple matter specifically to note that our government's votes in the United Nations and the Ambassador's statement should not be deemed to constitute recognition. Such reservations have often been utilized to avert any possible misconstruction of executive action in such situations. See, *e.g.*, 1 Hackworth, *Digest of International Law* 167, 348 (1940); Restatement (Second), Foreign Relations Law § 104, Reporters' Note (1965).

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We respectfully suggest that in these circumstances, the Court should grant Kunstsammlungen's petition for certiorari and follow one of two courses. The Court may choose to review the decision below; in that event, we believe that reversal would be appropriate since the implied recognition of the GDR has now cured any incapacity of Kunstsammlungen to sue. Or the Court may wish instead to vacate the judgment of the court of appeals and remand for reconsideration in light of the intervening recognition.

This latter course was recently taken in *First National City Bank* v. *Banco Nacional de Cuba*, 400 U.S. 1019 (1971). There, because of a letter from the Department of State received after the petition was filed, the Court granted the writ, vacated the judgment of the court of appeals and remanded for reconsideration without expressing any views on the merits of the case. Such a disposition seems appropriate here as well. It would comport not only with the rule that recognition during the pendency of the appeal cures any prior incapacity to sue, but also with the Court's policy to avoid decision on delicate questions of constitutional and international law where reasonable alternatives to decision exist. See, *e.g.*, *Kovacs* v. *Brewer*, 356 U.S. 604

(1958); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945).*

For the foregoing reasons, we respectfully urge that the petition for certiorari should be granted and the judgment of the court of appeals vacated.

Respectfully submitted,

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October, 1973

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* It is important to resolve the question of Kunstsammlungen's capacity to sue in the pending case rather than in a newly commenced action (or on a new motion to intervene). For, it may be suggested that in a new action or on a new motion, Kunstsammlungen would be barred, notwithstanding recognition of the GDR, by the statute of limitations. Judge Rifkind's decision in *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 637 (S.D. N.Y. 1944), *modified in part on other grounds, aff'd in part*, 161 F.2d 571 (2d Cir. 1947), *cert. dismissed*, 332 U.S. 753 (1947), *cert. denied*, 332 U.S. 807 (1947), we believe, establishes that any statute of limitations is tolled during the period of nonrecognition in circumstances such as those here; although the earlier decision in *Union of Soviet Socialist Republics* v. *National City Bank of New York*, 41 F. Supp. 353 (S.D.N.Y. 1941), suggests a contrary result (erroneously, in our view, and in any event in circumstances different from ours). Nevertheless, confirmation of Kunstsammlungen's right to sue in the framework of the pending case would eliminate any statute of limitations problem.

Appendix

UNITED STATES DELEGATION
TO THE UNITED NATIONS

FOR IMMEDIATE RELEASE

Press Release USUN 83 (73)
September 18, 1973

Statement by Ambassador John Scali, United States Representative to the United Nations, in Plenary, on the admission to membership in the United Nations of the German Democratic Republic , the Federal Republic of Germany, and the Bahamas, September 18, 1973.

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Mr. President, may I offer my warm congratulations and those of the United States as you, the distinguished representative of a respected neighbor, assume the Presidency of this 28th General Assembly. It is a special honor for me to speak as the representative of the host country at this moment in history. Three new members have taken their places today in the supreme parliament of mankind. One of them is a small country, particularly meaningful to us because it is a neighbor and a good neighbor. The entry of the two German states is the culmination of a generation of diplomacy, both inside and outside the United Nations, a process in which all parties have come to recognize the realities of today's world. It has been a process in which step by step the world has recognized that neither ideological conflicts, bitter memories, or war-bred jealousies can be allowed to obstruct the building of a better future.

By welcoming new members, we have moved only part way on the road to enduring peace but, accompanied as it is by other moves toward international harmony, it is a move that should cause mankind to take heart and satisfaction.

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We welcome the independent Bahamas to the United Nations with particular affection. This newest American republic is a close neighbor with whom we have much history in common. Like us, the Bahamas have a freely elected and representative government, the head of which, in the person of Prime Minister Pindling, is here among us today. We had been friends many years. The American Government has been represented in Nassau since 1821. We look forward to continuing these close ties with the Bahamas bilaterally and within this organization.

The entry of the two German states into the United Nations is a great symbolic act. The United Nations has grown over the years from its original 51 members to 135. But it was not until today that it could be said to even approach its goal of universality.

The entry of the two German states moves the United Nations much nearer to this goal, enhancing its ability to function in the real world where real decisions are made and executed.

The United States is proud of the role which it has played in making this event a reality. Beginning in 1969, President Nixon laid out a new blueprint for peace designed to replace conflict and confrontation with negotiation. His program was far more than atmospherics. He has since 1969 amply demonstrated his resolution to deal vigorously and forthrightly with the most difficult issues of our time and to lessen the threat of nuclear arms in a historic agreement with the Soviet Union. In Europe, the search for peace has meant seeking improvements in the Berlin situation, altering the nature of relations between East and West, reducing the military confrontation of opposing coalitions and lowering the barriers to travel, cultural and intellectual intercourse. It has also meant moving with careful steps toward normalizing diplomatic relations with the People's Republic of China and other nations.

The progress through careful negotiation is not and cannot be the work of one country or even a small group of countries. We are working with the Soviet Union in full concert with our allies to settle the differences of decades and reduce tensions in Central Europe.

A cornerstone of these efforts has been the Quadripartite Berlin Agreement, a document which shows what can be accomplished when there is readiness to reject the outworn ideological positions and search for ways to solve the stubborn problems. The Berlin Agreement demonstrates anew that even the most rigid deadlock can be resolved through patient negotiations and mutual accommodation.

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This agreement in turn was followed by the quadripartite declaration of November 1972 in which all four powers agreed to support UN membership for the two German States. Today, we have witnessed one of the fruits of those agreements.

Throughout this process, the Federal Republic of Germany has played a major and constructive role. Its policies have helped lay the groundwork for today's event. It has taken and is continuing to take imaginative and forward-looking steps to place this relationship with the Soviet Union over Eastern European countries and the German Democratic Republic on a sound and stable basis. The Federal Republic is, moreover, taking these steps in full consonance with its responsibilities for the maintenance of peace, stability and security in the European continent.

The Federal Republic of Germany is no stranger to the United Nations. It has played a substantial, indeed, often leading role in the specialized agencies of this body. Its contributions have already brought great benefit to mankind. Now with its full participation, the entire world community stands to benefit.

We have also noted with appreciation the declaration of the German Democratic Republic of its intention to abide by the principles of the United Nations Charter and to make its full contribution toward alleviating the world's economic, social and humanitarian ills.

In this connection, it is the particular hope of the United States that the German Democratic Republic which occupies part of the territory of the former German Reich, will also recognize the just claims of those who suffered as a result of the actions of the Nazi government. The Federal Republic of Germany, for its part, took exemplary and commendable measures in this regard many years ago.

The economic, technical, scientific, cultural and spiritual contributions of the German people have justly attracted wide admiration and greatly enriched the world. Today, we look forward to their full and effective participation in the immense international economic and social tasks facing the United Nations. The effort to improve the condition of man is not a task for only a few. It is a burden all nations must bear. Disease, hunger, human misery, pollution, and natural catastrophy oppress us all. The earth, air and sea are a common heritage and a common concern. The tools of science, technology, and education, which the German people are so eminently qualified to provide will be used to benefit every nation With the help of the two German states, this world body will be better able to meet mankind's pressing problems. This is a day of great pride for the peoples of the world.

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The generation which fought World War II is reassured by the entry of the two German states into the United Nations. Those who have lived through the strife of the post-war years can take heart. We learn from the past. For only with such a perspective can we grasp the full meaning of this solemn moment. But I would suggest that the larger meaning is found not by looking behind but by looking ahead. The most serious differences among nations can and must be resolved diplomatically. There is no other way short of catastrophy. Ideological differences remain and are immense. But here in the United Nations the principles of universality and cooperation are and must be demonstrated once more for all to see. Is it too much to hope that today will also mark the beginning of a new realism for this body as it goes about its noble task on behalf of the peoples of all the world? As I welcome the two German states on behalf of the United States, I express this fervent hope, may peace,may justice be with us all.

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In the

Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-492

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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Respondents.

BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Questions Presented

The central issue presented is the question whether, in the face of explicit findings by the district court, affirmed by the court of appeals, that the petitioner is an arm or agency of the German Democratic Republic and that its juridical status was conferred upon it at the threshold of this litigation for the purpose of avoiding the consequences of the doctrine of non-recognition, petitioner must be allowed to sue in the federal courts, notwithstanding the continuing refusal of the Executive Branch to recognize either the state or government of the German Democratic Republic. This central issue presents three subordinate questions.

1. Whether the long-standing and consistently applied rule which excludes non-recognized governments as litigants should be overturned.

2. Whether the 1923 Treaty of Friendship, Commerce and Consular Rights between the United States and Germany confers a right to sue on an agency of the GDR, despite non-recognition.

3. Whether an agency of the GDR is entitled to sue, despite non-recognition, on the theory that the GDR is itself merely an agency of the (recognized) government of the Soviet Union.

Statement of the Case

These actions represent attempts, twenty-five years after the event, to recover two oil paintings by Albrecht Duerer alleged to have been stolen in July 1945 from the war-time repository of the collections of the Staatliche Kunstsammlungen zu Weimar ("State Art Collections in Weimar"), in Weimar, Germany. The defendant has answered asserting his purchase for value and in good faith, and in ignorance of any adverse claim, and raised various affirmative defenses. The merits of these issues are not involved in the aspect of the litigation presented by the petition, which on the contrary reflects a controversy among the Federal Republic of Germany, the petitioner, and the United States as to the right of the GDR to participate through the petitioner as a litigant.

The complaint of the Federal Republic asserted that it was "the only government which may represent the German people" and advanced a claim to the paintings "in order ultimately to restore them to the person or party who is truly and rightfully entitled to their possession" (A 3).[1] The

1. References designated "A" are to pages of the Joint Appendix in the court of appeals.

hereditary Grand Duchess of Saxe-Weimar-Eisenach intervened in the action commenced by the Federal Republic, alleging a claim to the paintings as personal property of the former grand ducal house. The petitioner then commenced an independent action to recover the paintings and at the same time moved to intervene in the action commenced by the Federal Republic, asserting that the Federal Republic had no interest in the paintings (A 19). The affidavit of April 11, 1969, accompanying the motion to intervene stated that petitioner "is in existence [and] is functioning as an active and duly constituted juristic entity" (A 17), although it was subsequently made clear that that status derived from an order of the Minister of Culture of the GDR dated three days thereafter, on April 14, 1969, and made by its terms retroactive to January 1, 1969 (A 36).

In July 1969 the United States filed a "Suggestion of Interest" (A 22-23) stating that the United States does not recognize the East German regime, that it recognized the Federal Republic "as the only German government entitled to speak for Germany as the representative of the German people in international affairs," and that it recognized the Federal Republic as entitled to represent the interests of the Weimar Museum in the litigation. The State Department reiterated the position that the United States does not recognize the East German regime in a letter from the Acting Legal Adviser submitted to the district court on August 2, 1972 (A 365-68).

In a decision dated June 25, 1970 (Pet., pp. 6a-11a) Chief Judge Mishler held that the GDR itself, because of nonrecognition, could not sue but invited a further factual showing as to the relationship of the petitioner to the GDR. Thereupon, after depositions in Vienna of four East Ger-

man witnesses presented by the petitioner,[1] and the testimony of a West German expert on East German law given in open court, the district court issued its supplemental decision. It found that petitioner was "performing a governmental function as an arm or agency of the GDR" prior to the order of April 14, 1969, that that order "in no way altered the relationship between [petitioner] and the GDR," and that, in any event, the order was "designed by the GDR to avoid the obstacle erected against a non-recognized power for the purpose of this litigation" (Pet., p. 14a). In consequence, petitioner's motion to intervene was denied, and judgment was entered dismissing petitioner's independent action. The court of appeals affirmed (Pet., p. 5a).

Reasons Why The Writ Should Be Denied

1. The principle that closes the courts of the Nation to an unrecognized foreign government is well-established, supported in prior decisions, including decisions of this Court, and justified by the constitutional division of authority among the branches of the Federal Government which assigns to the Executive Branch the conduct of foreign affairs. The petitioner cites no contrary decisions, for there are none, and in discussion of the principle of the matter is able to do no more than reiterate the views of a school of commentary that for many years has been critical of decisions in this Court and elsewhere which recognize the heavily political character of issues of foreign affairs, such as this one, and hence their inappropriateness for judicial

1. Visas to permit the witnesses to come to New York to testify were refused.

resolution.[1] The established doctrine is sound and was correctly applied below, and there is no need for review in this Court. Moreover, as we show in point 2, below (pp. 7-10), the special circumstances applicable to Germany would make this a particularly inappropriate case for any reconsideration of the doctrine.

Contrary to the suggestion in the petition (Pet., p. 8), the decision for a unanimous Court in *Guaranty Trust Co.* v. *United States*, 304 U.S. 126 (1938), cannot be disposed of simply as dictum. The issue there was the right of the United States under the Litvinoff Assignment to press a claim arising out of an Imperial Russian deposit account found by the district court to have been repudiated sufficiently prior to suit to bar the claim if the six-year New York statute of limitations applied to it. In this context, Justice Stone's statement that "[I]n conformity to generally accepted principles, the Soviet Government could not maintain a suit in our courts before its recognition by the political department of the Government" (304 U.S. at 137), was no idle observation, for the case would have presented quite a different aspect had it been true that the assignor had simply forborne to sue although able to do so. Other decisions applying or recognizing the exclusionary rule include *Bank of China* v. *Wells Fargo Bank*, 104 F. Supp. 59

1. With the criticism of the *Cibrario* decision (*Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255 (1923)), to which petitioner points (Pet., p. 13), should be compared criticism of this Court's decision in *United States* v. *Pink*, 315 U.S. 203 (1942), see Borchard, *Comment, Extraterritorial Confiscations*, 36 Am. J. Int. Law 275 (1942), and *Comment, Shall the Executive Agreement Replace the Treaty*, 38 Am. J. Int. Law 637, 643 (1944), and of its decision in *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), see Stevenson, *The State Department and Sabbatino—'Ev'n Victors Are by Victories Undone,'* 58 Am. J. Int. Law 707-08 (1964), in which it is suggested that this Court had "taken up with a vengeance the implications in the State Department's brief that United States courts are not appropriate fora for the resolution of controversial international law questions."

(N. D. Calif. 1952), *modified*, 209 F.2d 467 (9th Cir. 1953); *The Penza*, 277 Fed. 91 (E.D.N.Y. 1921); *The Rogdai*, 278 Fed. 294 (N.D. Calif. 1920); *Russian Socialist Federated Soviet Republic* v. *Cibrario*, 235 N.Y. 255 (1923); *State of Yucatan* v. *Argumedo*, 92 Misc. 547, 157 N.Y.S. 219 (Sup. Ct. N.Y. Co. 1915); *City of Berne* v. *Bank of England*, 9 Ves. 347, 32 E.R. 636 (Ch. 1804); *cf. Land Oberoesterreich* v. *Gude*, 109 F.2d 635 (2d Cir. 1940); see also *Latvian State Cargo & Passenger S.S. Line* v. *McGrath*, 188 F.2d 1000 (D.C. Cir.), *cert. den.*, 342 U.S. 816 (1951); *The Maret*, 145 F.2d 431 (3rd Cir. 1944); *The Florida*, 133 F.2d 719 (5th Cir.), *cert. den. sub nom. Tiedemman et al.* v. *Estoduras S.S. Co., Inc.*, 319 U.S. 774 (1943).

It has been settled doctrine for more than a century that it is not open to courts "to inquire into, and ascertain by other evidence the title of an [unrecognized] government . . . and if such evidence satisfies the court, to decide against the doctrines and claims set up and supported by the American government on this subject"; on the contrary, "as the executive . . . has denied [its] jurisdiction . . . the fact must be taken and acted on by this court as thus asserted and maintained." *Williams* v. *Suffolk Ins. Co.*, 13 Pet. (38 U.S.) 415, 417, 420 (1939). Accord, *Jones* v. *United States*, 137 U.S. 202, 212 (1890); *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398, 410 (1964); *Restatement (Second), Foreign Relations Law of the United States*, Reporter's Note to § 106.

The *Sabbatino* decision emphasized the "unique legal aspect" of non-recognition, signifying "this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control," and that, in consequence, to permit such a government (as distinct from one with which merely

diplomatic relations were broken) to sue risked "the possible incongruity of judicial 'recognition,' by permitting suit, of a government not recognized by the Executive." (376 U.S. at 410). These views were properly applied by the courts below. The suggestion in the petition, that an exception should be recognized for claims to property (Pet., pp. 17-18), was rejected below for good reason. Aside from the fact that most such suits would involve claims to property, so that any "exception" would replace the rule, the suggestion ignores the central point, explicit in Mr. Justice Harlan's reasoning in *Sabbatino,* that the possible incongruity does not depend on the *nature* of the claim but rather arises out of the assertion, necessarily advanced in any such case, that as a government the unrecognized foreign party possesses and asserts whatever the claim may be.

There is no issue in this Court that, as the district court found, and the court of appeals affirmed, the petitioner prior to being hastily clothed with juridical status was "performing a governmental function as an arm or agency of the GDR," that the order of April 1969 conferring that status "in no way altered the relationship between [petitioner] and the GDR" and that the order, in any event, was "designed by the GDR to avoid the obstacle erected against a non-recognized power for the purpose of this litigation" (Pet., p. 14a). This Court's decisions establish that "in the absence of a very obvious and exceptional showing of error," which has not even been attempted here, "this Court . . . cannot undertake to review concurrent findings of fact by two courts below." *Graver Mfg. Co.* v. *Linde Co.,* 336 U.S. 271, 275 (1949); *Berenyi* v. *Immigration Director,* 385 U.S. 630 (1967).

2. Even were there a basis for accepting some modification in the traditional broad exclusion of unrecognized governments as suitors in the courts, the special circumstances

obtaining as to Germany make any initiatives by the Judicial Branch particularly inappropriate. In the usual case, the status of a state or government arises out of circumstances in which the United States has no direct role. In regard to Germany, however, the circumstances are wholly different and without precedent—and likely without future parallel. The formal status of Germany is a matter of international agreements to which the United States is a party and under which it claims rights, and any recognition of the state or government of East Germany thus would constitute the quite extraordinary situation of a waiver by the United States of rights purportedly assured by contract. Even in the normal case, the political character of recognition has sufficed to induce the courts to exclude the unrecognized government. The case for doing so is that much stronger in regard to Germany, both because of this history and also because of the obviously critical role which "the German situation" plays in United States policy toward Europe.

It will suffice to recall to the Court that the original agreements in regard to Germany expressly provided that four-power "assumption of powers and authority does not affect the annexation of Germany" and left for subsequent agreement any changes in the boundaries of Germany as they existed in 1937.[2] The original conception was that supreme

2. Declaration of June 5, 1945, and Allied Statement on Zones of Occupation in Germany of the same date. *Documents on Germany, 1944-1970,* Sen. Comm. on For. Rel., 92nd Cong., 1st Sess (1971) (hereafter cited as "Documents on Germany") 13, 17. The Statement on Zones of Occupation defined "Germany" by reference to its boundaries on December 31, 1937. As thus defined the Soviet Zone for purposes of occupation included East Prussia and those parts of Germany proper east of the Oder-Niesse line which the Soviet Union, Poland and Czechoslavakia have subsequently purported to incorporate into their national territory, notwithstanding the explicit language in the June 5 Declaration. See, for example, the Agreement of June 6, 1950, on Demarcation of the Polish-[East] German Frontier, *Documents on Germany* 179.

authority in "matters affecting Germany as a whole" would be taken by the Four Powers jointly and unanimously. *Documents on Germany* 18. The Potsdam Agreements (July-August 1945) laid down rules for administration of Germany as a unitary whole so that "so far as practicable, there shall be uniformity of treatment of the German population throughout Germany," with the further prescription that "during the period of occupation Germany shall be treated as a single economic unit." *Documents on Germany* 33, 35. It is at once apparent that the arrangements contemplated in these agreements precluded the development of a sovereign state encompassing merely the portion of the Soviet Zone left after the incorporation, itself unauthorized, of segments of pre-war eastern Germany into the Soviet Union, Poland and Czechoslavakia. See generally, Mann, *Germany's Present Legal Status Revisited,* 16 Int. & Comp. L. Q. 760 (1967).

Subsequently, of course, unitary administration fell victim to American-Soviet differences. The Soviet Commander walked out of the four-power Control Council in March 1948, which ceased to function, the Berlin blockade and airlift followed, and in September 1949 the Federal Republic of Germany was established. The Soviet Union created the GDR in October of the same year. See Mann, *op. cit. supra,* 762-65. The treaty arrangements made by the Western Powers with the Federal Republic carefully reserved to the Powers "the rights and responsibilities, heretofore exercised or held by them, relating to Berlin and Germany as a whole, including the reunification of Germany and a peace settlement."[3] The Soviet Union, aim-

3. Convention on Relations Between the Three Powers and the Federal Republic of Germany, Arts. 1(2), 2, May 26, 1952, as amended by Schedule I to the Protocol on the Termination of the Occupation Regime in the Federal Republic of Germany, October 23, 1954, 6 U.S.T.&O.I.A. 4121, T.I.A.S. No. 3425. *Documents on Germany* 249.

ing by contrast at a divided Germany *in perpetuo*, recognized the Federal Republic in 1955 (*Documents on Germany* 272-73), at the same time concluding a treaty with the GDR in which the parties "reaffirm that the relations between them are based on complete equality of rights, mutual respect of sovereignty and the non-interference in each other's domestic affairs." *Documents on Germany* 274. Thus, for eighteen years it has been the Soviet view that "on the territory of Germany there exist two independent sovereign states . . ." Soviet Note of October 18, 1955, *Documents on Germany* 278. The contrary position of the United States has been that it recognizes neither "the East German regime nor the existence of a state in the Soviet Zone." Statement of September 28, 1955, *Documents on Germany* 276.

Where, as here, the "facts giving rise to the pretended new title [the statehood of the GDR] are in violation of international law . . . recognition fulfills a function altogether distinct from other aspects of recognition," constituting by exercise of a "political function" the "waiver of a right." Lauterpacht, *Recognition in International Law* 412. Against this background it would be more than merely "incongruous" for the Court to acknowledge the pretensions of the GDR in this litigation in direct conflict with the reiterated, and still unchanged, policy of the United States.[4] The petitioner's applications for an extension of time to file its petition have given emphasis to the supposed imminence of a change in that policy. It is surely suf-

4. Statements of the policy appear in 23 Dept. of State Bull. 530 (1950); 33 Dept. of State Bull. 559 (1955); 50 Dept. of State Bull. 993 (1964); in the original Suggestion of Interest in this case (A 22-23), reiterated in a Memorandum on Behalf of the United States, dated July 31, 1972 (A 365-68).

ficient that it has not yet occurred.[5] Moreover, it is surely not for the Court to anticipate. If concessions were to be sought in any negotiations on the subject, premature "judicial recognition" of which the opinion in *Sabbatino* was apprehensive could, of course, easily and seriously compromise political objectives.

3. The petitioner's suggestion that it should be viewed as a sub-instrumentality of the Soviet Union, concededly based on a fiction (Pet., p. 25), is more accurately a *reductio ad absurdum*. There is of course no factual support for it, for the view of the Soviet Union and the GDR, as expressed in the treaty of 1955 between them, discussed above, p. 10, is directly at variance with the petitioner's suggestion that they should be treated as principal and agent. Nor is there policy-reasoned support for any such fiction. The United States does not regard the Soviet Union as the responsible government of East Germany in any sense material here. As already noted (pp. 8-9, *supra*), the Soviet Union is not in any ordinary way sovereign in East Germany, and there is no proper basis for concluding that the Soviet Union (through its "agent," the petitioner) is the appropriate spokesman *abroad, viz.*, in this litigation, for that portion of Germany territorially

5. The admission of East Germany to the United Nations does not itself constitute recognition by the United States. The Byelorussian S.S.R. and the Ukranian S.S.R. are both members of the United Nations, but neither is recognized as a state by the United States. *Restatement (Second), Foreign Relations Law of the United States*, § 105, Reporter's Note. This would appear to be a particular instance of the more general view, which has been explicitly adopted as United States policy, that "recognition of a regime or acknowledgment of an entity [as a state] cannot be inferred from signature, ratification or accession to a multilateral agreement." 56 Dept. of State Bull. 78 (1967). For obvious reasons, negotiations looking toward possible recognition would not themselves constitute recognition. *Restatement, supra* § 104(1).

described as East Germany. Logically, one reaches this contention of petitioner's only if its primary contention has been rejected, and thus one confronts the petitioner-as-agent-of-the-Soviet-Union only after it has been concluded that petitioner, as petitioner, ought not to be allowed to sue because of non-recognition of the GDR. In that context, to accept the fiction explicit in the Soviet agent theory is to strive for a conclusion dependent upon recognition of a legitimate Soviet role in East Germany as much at variance with United States policy as a judicial recognition of an independent East Germany.

The only authority which petitioner advances is the decision of the House of Lords in the English *Zeiss* case, *Carl-Zeiss-Stiftung* v. *Rayner and Keeler, Ltd.*, [1966] 2 All E. R. 536 (H.L.). The certificate of the Foreign Office upon which the court acted, referring to the *de jure* authority of the Soviet Union in the East Germany, differed materially from the views stated to the court here by the State Department, and the result reached by the House of Lords has been severely criticized. See Mann, *op. cit. supra* at 773-76; *Comment, A Divided Country in Foreign Courts—Recent Litigation Involving Germany's Legal Status and the Zeiss Stiftung*, 65 Mich. L. Rev. 924, 930-31, 937-39 (1967). In any event a situation more completely *sui juris* than these circumstances would be hard to envisage, and as such this issue presents no claim to review on the merits in this Court.

4. The 1923 Treaty issue was correctly decided below, and raises no question requiring review in this Court. In the view which the petitioner necessarily takes of the Treaty, Article XII confers the right of suit, notwithstanding non-recognition, on the government of East Germany itself (or its instrumentality). This is wrong for two

reasons. First, the Treaty text does not confer any right of access to courts on *public* corporations such as petitioner. This is clear from the context in the English version, but clear also as a matter of the Treaty language itself in the parallel German version which speaks of access to the courts of either contracting party by "Juristische Personen des Privatrechts", meaning "legal persons of private law." On no theory does petitioner qualify as such an institution.[6] Secondly, if the text of the Treaty conferred such a right on the GDR (or petitioner), it would be plain that it conflicted directly with superseding policy of the Executive Branch taken in the conduct of foreign affairs, within the doctrine recognized by this Court in *Clark* v. *Allen*, 331 U.S. 503 (1947). To give Article XII the reading urged by petitioner would run directly counter to the statement furnished by the State Department to the courts in this litigation that the Treaty "does not require that the privilege of bringing suit be accorded to the East German regime or an agency of instrumentality of that regime. . . ." (A 368).

Many provisions of the Treaty, which on petitioner's reading should have application to the East German regime, plainly have none, and this circumstance is a forceful commentary on petitioner's view of the applicability of Article XII. Articles XVII-XXVII, for example, deal with the exchange of consular officials, the establishment of their rights, privileges and immunities on a "most favored nation basis" (Article XVII), and other questions of consular functions. These provisions of course are dead letters; the

6. There is no question that petitioner is a "legal person of public" not "private" law. It was created by the Minister of Culture to perform public functions and its employees are public officers (A 275-78). Were it a juridical person of private law, it would be incapable of acting, as in fact it does (see pp. 21-22 of the separate volume of Exhibits in the Court of Appeals), as a "bearer of rights" of "people's property." (A 311).

United States does not recognize any consular function of the GDR. Even Article I of the Treaty, purporting to confer on nationals of the contracting parties reciprocal rights of entry, travel and residence on a most-favored-nation basis, must be contrasted with the circumstance that East German witnesses could not, in fact, obtain visas to attend hearings in this litigation. What these circumstances represent is an illustration of the possibility noted in *Clark* v. *Allen, supra*, that "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of a treaty in whole or in part." (331 U.S. at 508-09). Thus, there is no reason not to accept the State Department view that the Treaty does not require allowing petitioner to sue.[7]

Conclusion

For the reasons stated the petition for a writ of certiorari should be denied.

Respectfully submitted,

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7. Cf. *Terlinden* v. *Ames*, 184 U.S. 270, 288 (1902): "[T]he question whether power remains in a foreign State to carry out its treaty obligations is in its nature political and not judicial, and . . . courts ought not to interfere with the conclusions of the political department in that regard."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

BRIEF OF FEDERAL REPUBLIC OF GERMANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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BRIEF OF FEDERAL REPUBLIC OF GERMANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

The Petition for a Writ of Certiorari by petitioner Kunstsammlungen zu Weimar (the "Kunstsammlungen") seeks review of a judgment[1] of the United States Court of Appeals for the Second Circuit of New York, affirming an order and judgment of the United States District Court for the Eastern District of New York[2] which denied the Kunstsammlungen's motion to intervene in an action

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[1] The Opinion of the United States Court of Appeals for the Second Circuit of New York is reported at 478 F. 2d 231 (2d Cir. 1973) and printed at pages 2a-5a of Appendix B annexed to the Petition for a Writ of Certiorari.

[2] The Opinion of the United States District Court for the Eastern District of New York is reported at 358 F. Supp. 747 (EDNY 1972) and printed at pages 6a-17a of Appendix C annexed to the Petition for a Writ of Certiorari.

commenced by respondent Federal Republic of Germany ("Federal Republic") seeking recovery of two oil paintings stolen from Germany after the cessation of hostilities in 1945, presently in the possession of respondent Edward I. Elicofon ("Elicofon"). Petitioner's duplicative complaint, as its motion to intervene seeking relief directed against Elicofon, was correspondingly dismissed.

Question Presented

Only one question need be answered in determining whether the Petition should be granted:

> Should this Court review a case where none of the factors designated in Rule 19 of the Supreme Court Rules is present and where both the Court of Appeals and the District Court found factually that Petitioner was an agency and instrumentality of an unrecognized foreign government and, accordingly, lacked litigant status?

Petitioner seeks to raise four other issues, all of which have been resolved in favor of Federal Republic by the Courts below, none of which need be answered unless this Court answers the threshold question in the affirmative. In that event, the additional questions presented are as follows:

> 1. Should this Court review a factual finding, based entirely upon the record, that the Kunstsammlungen was an agency or instrumentality of the German Democrat Republic, a non-recognized foreign government? and
>
> 2. Should this Court review an action concerning foreign policy determinations of the Executive manifested by the filing of a Suggestion of Interest which

expressly denies recognition of the East German regime?[3]

Statement of the Litigation

Respondent Federal Republic instituted its action on January 27, 1969, in the Eastern District of New York, seeking equitable replevin of two oil paintings of Hans and Felicitas Tucher (the "Duerer Paintings") attributed to the renowned German artist Albrecht Duerer during the year 1499.

The claim of the Grand Duchess of Saxony-Weimar rests on the assertion that the Duerer Paintings were constituents of an art collection belonging to the Duke of Sachsen-Weimar-Eisenach through whom the Grand Duchess receives her status.

Prior to the centralization of all German governmental functions under the Third Reich, the Duerer Paintings were part of a public art collection of the Federal German State of Thuringia, under the administration of the Staatliche Kunstsammlungen in Weimar,[4] an agency of the

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[3] The Suggestion of Interest of the United States filed in May of 1969 and re-affirmed by a letter of the Department of State dated July 31, 1972, states:

> "3. The United States Department of Justice has been requested by the Department of State to place on record before the Court the following views of the Executive Branch of the Government bearing on this litigation:
>
> '1. The United States Government does not recognize the East German regime.
>
> '2. The United States Government recognizes the Federal Republic of Germany as the only German Government entitled to speak for Germany as the representative of the German people in international affairs.
>
> '3. The United States Government recognizes the Federal Republic of Germany as entitled in this litigation to represent the Weimar Museum as trustee of its interest.' "

[4] "Staaliche Kunstsammlungen in Weimar" can be translated as "State Art Collection at Weimar".

government. During 1945, prior to the destruction of the Third Reich, the contents of the State Art Collection, including the Duerer Paintings, were removed to Castle Schwarzburg for safekeeping. During the occupation of that area by the armed forces of the United States and sometime prior to July 1, 1945, the Duerer Paintings were stolen. Twenty-one years later, during 1966, the Duerer Paintings reappeared in the possession of respondent Elicofon, a citizen of the United States and resident of the Eastern District of New York.

On April 14, 1969, petitioner, the Kunstsammlungen[5], alleging that it was the successor to the State Art Collection from which the Duerer Paintings were stolen, sought leave to intervene in the Federal Republic's action. The Kunstsammlungen, correspondingly, commenced a separate action against respondent Elicofon in the Eastern District of New York seeking the return of the Duerer Paintings.

The District Court denied the Kunstsammlungen leave to intervene and dismissed its action for want of litigant status as an agency and instrumentality of a non-recognized foreign government. *Federal Republic of Germany* v. *Elicofon,* 358 F. Supp. 747 (EDNY 1972). The Circuit Court of Appeals affirmed, Per Curiam, and denied petitioner's motion for rehearing and *in banc* consideration by orders dated June 18, 1973. *Kunstsammlungen Zu Weimar* v. *Elicofon,* 478 F. 2d 231 (2d Cir. 1973).

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[5] The Kunstsammlungen's purported intervenor status arose from an order of the Minister of Culture of the German Democratic Republic dated April 14, 1969, declaring "juristic person[age]" upon the Kunstsammlungen. In so far as said order was promulgated some four months subsequent to the institution of the Federal Republic's action, it is not surprising that the East German order was retroactive to January 1, 1969 in an obvious effort to overcome anticipated status problems.

The Nature of the Kunstsammlungen

During the period of Soviet occupation of the East German territories, the State Art Collection at Weimar came into the custody of the State of Thuringia[6] remaining in its custody until 1952.

On October 7, 1949, the German Democratic Republic ("GDR") was established in the East-German territories. On July 24, 1952, the Volkskammer ("Peoples Chamber"), which is the legislative organ of the GDR, abolished the States as political subdivisions and the State of Thuringia was divided into three counties ("Bezirke") and thirty-six districts ("Kreise"). The Volkskammer's enactment resulted in all publicly owned property ("people owned property"), including the State Art Collection, passing to the Socialist State. The administration and custodial functions of said art collection, subject to the ultimate control of the central government, came within the jurisdiction of the City of Weimar, a political subdivision of the GDR, and management of the art collection continued under the title "Staatliche Kunstsammlungen in Weimar".

On April 14, 1969, the GDR's Minister of Culture by order conferred the status of a "juristic person" on the Kunstsammlungen, retroactive to January 1, 1969. The Kunstsammlungen's Director, appointed and subject to dismissal by the Lord Mayor of the City of Weimar[7], was accorded the right to represent the Kunstsammlungen in legal matters before East German tribunals. Upon its own purported "juristic person[age]", as recited in the order of the GDR Minister of Culture, the Kunstsamm-

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[6] Respondent Federal Republic advises this Honorable Court that the State of Thuringia, created by the Soviet Military Administration in 1945, is not the legal successor to the former Federal German State of Thuringia.

[7] See Section 10 of the STATUT of the Weimar Art Collection at page 17a of Appendix C to the Petition for a Writ of Certiorari.

lungen seeks by the instant petition to have this Court reverse the factual findings of the Courts below that it is an agency and instrumentality of a non-recognized foreign government, afflicted with the identical infirmities.

Reasons for Denying the Writ

The decision of the Second Circuit Court of Appeals follows well-recognized and controlling precedent, does not conflict with decisions of this Court or of any other Circuit, and does not present any issue worthy of review by this Court.

I

The Court of Appeals for the Second Circuit correctly affirmed the District Court and denied petitioner's litigant status in accordance with controlling precedent.

Petitioner's argument that the Courts below engaged in "an abdication of judicial responsibilities" (Petition, p. 16) is but a desperate effort to circumvent the controlling precedents. It is well established that the determination of "[w]ho is the sovereign, de jure or de facto, of a territory is not a judicial but a political question, the determination of which by the legislature and executive departments of any government conclusively binds the judges, as well as all officers, citizens and subjects of that government". *Jones* v. *United States,* 137 U.S. 202, 212 (1890); *Guaranty Trust Co. of N.Y.* v. *United States,* 304 U.S. 126, 137 (1938). The underlying rationale of the Executive's prerogative of sovereign determination is the avoidance of an otherwise irreconcilable division between the executive and judicial departments of our government. *Williams* v. *The Suffolk Insurance Company,* 38 U.S. 415, 419 (1839).

That foreign nations are afforded the privilege of access to American courts rests on the premise of comity among sovereigns. The prevailing comity required to confer litigant status upon a foreign government is the comity of nations rather than the comity of courts. *The Bank of Augusta* v. *Earle,* 13 Pet. 519, 588 (1839).

Despite petitioner's urging, the Courts below refused to ignore the precedents that where a foreign government has not been recognized by the Executive there is an absence of comity of nations and such non-recognized foreign government is without litigant status affording it the privilege to sue in American courts. *Guaranty Trust Co. of N.Y.* v. *United States, supra* at 137; *Russian Socialist Federated Republic* v. *Cibrario,* 235 N.Y. 255, 263 (1923); *The Penza,* 277 Fed. 91, 94 (EDNY 1921); *The Rogdai,* 278 Fed. 295, 296 (ND Calif. 1921).

Indicative of the conformity existing among the various Circuits which respect the Executive's prerogative is the First Circuit's recognition that an agency and instrumentality of a non-recognized foreign government suffers from the identical infirmity as does its higher governmental body. In *P&E Shipping Corp.* v. *Banco Para El Comercio Ext. De Cuba,* 307 F. 2d 415, 417-18 (1st Cir. 1962), although itself turning upon an agency of a *recognized* foreign government with whom diplomatic relations had merely been severed, the First Circuit reviewed the applicable law relating to instrumentalities of non-recognized foreign governments:

> "What is the status of the Republic of Cuba as a state and its right to sue in our courts during the period of cessation of diplomatic relations? *If it is not permitted to sue, then it would seem that appellee should not have been permitted to bring the suit here in question for it appears that appellee is an agent or instrumentality of the Cuban government. If the real party in interest is not permitted to sue, then suit on its*

behalf, whether disclosed or undisclosed on the record, should not be countenanced. But the status of the Republic of Cuba in our courts is a matter for the determination by the Executive branch of our government. National City Bank of New York v. *Republic of China,* 348 U.S. 356, 358, 75 S. Ct. 423, 99 L.Ed. 389 (1955)" (Emphasis added).

In applying these fundamental principles, the Courts below initially determined that the GDR, had it attempted to litigate in its own name, lacked the requisite litigant status as a non-recognized foreign government; the subsequent determination was factual and, upon a substantial record, held that petitioner, the Kunstsammlungen, was but an agency and instrumentality of the GDR, suffering from the same infirmities which attached to its creator.

Petitioner in prophetic fashion makes reference to the GDR as a "foreign government not yet formally recognized" (Petition, p. 8), with the accompanying innuendo that recognition is imminent and certain. This innuendo of recognition is neither buttressed by the record nor any other factor having probative value.[8]

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[8] The Federal Republic specifically rejects the Kunstsammlungen's erroneous characterization that The Basic Treaty between the Federal Republic and the GDR establishes diplomatic relations between the parties. (See page 14, Footnote 6 of the Petition).

To the contrary, the Federal Republic states that the Basic Treaty does not change the status of the GDR vis-a-vis the Federal Republic. The GDR and the Federal Republic are not recognized foreign countries as between themselves. The Federal Republic not only fails to recognize the GDR from the level of international public law, but has repeatedly and continually denied its international recognition. Instead of mutual recognition within the meaning of international public law both the Federal Republic and the GDR now recognize the rights of the four occupying powers. The Basic Agreement does not even provide for the establishment of diplomatic relations but at Section 8 provides merely for the exchange of permanent representatives.

In short, the Basic Treaty has no affect upon non-recognition of the GDR by the United States.

Moreover, petitioner's reference that the GDR is a permanent observer in the United Nations does not afford a reason for the grant of the instant petition. Even should the GDR enjoy unfettered admission to the United Nations, such status does not result in recognition of that government by the United States which must alone determine its foreign policy.[9] *Restatement (Second), Foreign Relations Law of the United States,* § 105, Ch. 3, Reporter's Notes.

It is submitted that in view of the definitive Suggestion of Interest filed at the direction of the Executive which denies recognition of the GDR and its instrumentalities[10], reaffirmed as late as August 2, 1972, the instant Petition for a Writ of Certiorari to the Court of Appeals for the Second Circuit should be denied.

II

No important unsettled issues are raised by the decisions below.

Both the Circuit Court of Appeals for the Second Circuit and the District Court for the Eastern District of New York applied the established law and correctly concluded that petitioner lacked litigant status as an instrumentality of a non-recognized foreign government. This issue is not one of great moment or precedential value insofar as this Court has definitively passed upon the infirmities which attach to non-recognized foreign governments.

Even petitioner's charge that the Courts below misread *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 11 L. Ed. 2d 804 (1964) does not warrant the granting of the instant Petition. The Kunstsammlungen, quoting out of context,

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[9] Although Albania is a member of the United Nations, the Executive Department of the United States does not recognize the regime of the government of Albania.

[10] See text of Suggestion of Interest of the United States recited at Footnote 3, *supra,* and Footnote 12, *infra.*

argues that *Sabbatino* declares that "the courts of this country should be closed to the government of a foreign state . . . [only if] the underlying reason [for doing so] is one of national policy transcending the interests of the parties to the action . . ." 376 U.S. at 408. However, what petitioner fails to advise this Court is that Mr. Justice Harlan in making that statement was specifically addressing himself to the *rejection* of an argument which reasoned that litigant status be denied Cuba on the grounds that it "is an unfriendly power and does not permit nationals of this country to obtain relief in its courts". 376 U.S. at 408. The Courts below did *not* rest their decisions upon the unfriendliness of the GDR or non-reciprocity of judicial access, but upon the premise that a non-recognized foreign government and its instrumentalities are not afforded the privilege of access to American Courts—particularly where the Executive has made such foreign policy determination known to the Judiciary.

Sabbatino clearly turned upon the recognized status of Cuba, with whom United States diplomatic relations had been severed as distinguished from a foreign policy determination of *non-recognition* as exists with respect to the GDR:

> "It is perhaps true that nonrecognition of a government in certain circumstances may reflect no greater unfriendliness than the severance of diplomatic relations with a recognized government, but the refusal to recognize has a unique legal aspect. It signifies this country's unwillingness to acknowledge that the government in question speaks as the sovereign authority for the territory it purports to control, see Russian Republic v. Cibrario, supra, 235 NY at 260-263, 139 NE, at 261-263. Political recognition is exclusively a function of the Executive. The possible incongruity of judicial 'recognition' by permitting suit, of a government not recognized by the Executive is completely absent when merely diplomatic relations are broken." 376 U.S. at 410-11.

The judicial scrutiny afforded the Kunstsammlungen by the Courts below, both reaching the same factual findings and legal conclusions, has been more than sufficient. This Petition seeks to have this Court reject all established precedents, as an accommodation to the East German regime, and should be denied.

III

The Courts below correctly held that the 1923 Treaty affords the Kunstsammlungen no greater rights than those possessed by its creator, the GDR.

Petitioner's reliance on the 1923 Treaty of Friendship Commerce and Consular Rights, 44 Stat. 2132 (1927), T.S. No. 725, is misplaced and has rightfully been rejected by the lower Courts.

The Kunstsammlungen's reliance upon *Zschernig* v. *Miller,* 389 U.S. 429 (1968) for the proposition that the 1923 Treaty has survived the war and is applicable to the East German territories does not negate the Kunstsammlungen's lack of litigant status as an instrumentality of a non-recognized foreign government. The issues of survival and application of the 1923 Treaty are irrelevant since the GDR itself cannot rely upon the Treaty to achieve litigant status. *Guaranty Trust Co. of N. Y.* v. *United States, supra* at 137-38; *Russian Socialist Federated Soviet Republic* v. *Cibrario, supra* at 263; *The Penza, supra* at 94; *The Rodgai, supra* at 296. Similarly, a non-recognized foreign government cannot by its own creation of a purported juristic entity be permitted to effortlessly frustrate the Executive's foreign policy determination and thereby avoid all corresponding infirmities. The District Court correctly opined that to hold otherwise "would permit non-recognized governments to use our courts at will by creating 'juridical entities' whenever the need arises. 358 F. Supp. at 757.[11]

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[11] See pages 14a-15a of Appendix C annexed to the Petition for a Writ of Certiorari.

As this Court, in *Clark* v. *Allen*, 331 U.S. 503, 508-09 (1964), has itself observed "the Chief Executive or the Congress may have formulated a national policy quite inconsistent with the enforcement of the Treaty in whole or in part". It is submitted that this Court should deny the Kunstsammlungen's Petition which, upon the premise of the 1923 Treaty or otherwise, seeks merely to frustrate the Executive's prerogative to guide and implement the foreign policy and international affairs of the United States.[12]

IV

The Court of Appeals for the Second Circuit correctly rejected the fictional argument that the Kunstsammlungen is an instrumentality of the USSR.

The Kunstsammlungen's fictional argument that it is a sub-instrumentality of the USSR, a recognized foreign government, is nothing less than a disingenious attempt to pierce the sovereign veil.

It is beyond contest that the USSR itself recognizes the GDR as the sovereign of the East German territories with

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[12] In pertinent part, a letter of the Department of State attached as an appendix to Memorandum, dated August 2, 1972, submitted by the U.S. Attorney for the Eastern District of New York, states:

> "2. The Department of State refers to its letter of May 13, 1969, the Suggestion of Interest of the United States and the Memorandum in Support of the Suggestion of Interest of the United States, filed July 2, 1969 in action No. 69-C-93 by the Department of Justice. As stated in numbered paragraph 1 of our letter of May 13, 1969, the Department of State does not recognize the East German regime. Further, as stated in paragraph 2 of the Memorandum, the privilege of bringing suit in the United States is accorded only to foreign states recognized by the Executive, or the agencies or instrumentalities of such states. It is our view that Article XII of the 1923 Treaty does not require that the privilege of bringing suit be accorded to the East German regime or an agency or instrumentality of that regime, regardless of the juridical form which such agency or instrumentality may have under the laws of the East German regime."

whom the USSR has the same relationship as it has with other sovereign states. Mann, *Germany's Present Legal Status Revisited,* 16 Int. & Comp. L. Q. 760, 770 (1967).

By a Treaty of September 20, 1955, the USSR and the GDR confirmed that "the relations between them are based on complete equality of rights, mutual respect of sovereignty and the non-interference in international affairs." *Documents on Germany,* 274, 1944-1970, Senate Comm. on For. Rel., 92 Cong. 1st Sess. (1971). The tenuity of the Kunstsammlungen's USSR fiction is evidenced by the fact that such fiction was not even included as a predicate of status in either the Kunstsammlungen's motion to intervene or in its independent action.

A Petition for a Writ of Certiorari should not be granted upon a fiction of sovereignty, which fiction expressly conflicts with the Executive's foreign policy determination, transcending pure legal doctrines, that the GDR (and its instrumentality the Kunstsammlungen), a non-recognized foreign government, is without the privilege of access to American courts.

CONCLUSION

For the foregoing reasons the Petition should be denied.

Respectfully submitted,

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ELLIOT PASKOFF
On The Brief

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

against

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (Grand Duchess of Saxony-Weimar),

Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT FEDERAL REPUBLIC OF GERMANY

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Respondents.

SUPPLEMENTAL BRIEF OF RESPONDENT FEDERAL REPUBLIC OF GERMANY

In accordance with recent instructions received from the Federal Republic of Germany, we respectfully wish to change the conclusion in our original brief to the effect that the Federal Republic of Germany has no objection to this case being remanded to the Circuit Court of Appeals for the Second Circuit for reconsideration or for a stay of all proceedings due to changed circumstances.

Respectfully submitted,

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No. 73-492

FILED
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In the Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR, PETITIONER

v.

FEDERAL REPUBLIC OF GERMANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
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In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-492

KUNSTSAMMLUNGEN ZU WEIMAR, PETITIONER

v.

FEDERAL REPUBLIC OF GERMANY, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This memorandum is submitted in response to the invitation of the Court, dated December 3, 1973, for the Solicitor General to express the views of the United States in this case.

STATEMENT

In January 1969, the Federal Republic of Germany ("Federal Republic") instituted an action in the United States District Court for the Eastern District of New York (No. 69-C-93) to recover two valuable paintings said to have been executed by the medieval German artist Albrecht Duerer, which were in the possession of the respondent Edward I. Elicofon ("Elicofon"). The paintings were alleged to have been stolen from the Weimar Museum some time between May and July 1945, when the City of Weimar was under military

occupation by United States forces. The occupation of the city was subsequently relinquished by the United States to the military forces of the Soviet Union. After World War II the City of Weimar became part of what came to be known as the Eastern Zone of Germany, and is presently located in the territory of the German Democratic Republic ("GDR").

In March 1969, the respondent Grand Duchess of Saxony-Weimar intervened in the suit, claiming ownership of the paintings by assignment from the former Grand Duke of Saxony-Weimar. Thereafter, in April 1969, the petitioner Kunstsammlungen sought leave to intervene in the action, and also instituted an independent suit against Elicofon (No. 69-C-370), seeking a return of the paintings on the ground that it was the successor to the Weimar Museum. Petitioner alleged that it was an independent juristic entity existing under the laws of the GDR, having obtained that status as a result of a decree of the Minister of Culture and Education of the GDR, issued subsequent to the institution of the original action by the Federal Republic.

All respondents opposed petitioner's attempted intervention, maintaining that petitioner was an instrumentality of a non-recognized government, and lacked standing to sue in the American courts. Elicofon also moved to dismiss the independent action against him on the same basis.

In July 1969, the United States Attorney, acting upon the direction of the Attorney General and on behalf of the Department of State, filed in the Federal Republic's action a "Suggestion of Interest" submitting to the court that the Executive Branch of the United States Government (1) does not recognize the East German regime;

(2) that it recognizes the Federal Republic as the only German government entitled to speak for Germany as the representative of German people in international affairs; and (3) that it recognizes the Federal Republic as entitled in this litigation to represent the Weimar Museum as trustee of its interests.

In a memorandum decision of June 25, 1970 (Pet. App. C, pp. 6a-11a), the district court ruled that the government of the GDR, not being recognized, lacked standing to sue. The court ordered an evidentiary hearing to determine whether the petitioner was an arm or instrumentality of the GDR so as to suffer from the same disability.

After the hearing, the district court ruled (Pet. App. C, pp. 11a-17a) that the petitioner was an "arm and agency of the GDR" and lacked standing to sue. The court denied the petitioner intervention in the action instituted by the Federal Republic, and dismissed the independent action which the petitioner had brought against Elicofon.

The Court of Appeals for the Second Circuit affirmed the district court's two rulings (Pet. App. B, pp. 2a-5a). Petitioner filed a petition for a writ of certiorari, which the Federal Republic and Elicofon opposed. They contended that the courts below correctly concluded that petitioner lacked standing to sue because petitioner was an agency of a non-recognized government.[1]

In a supplemental brief filed on October 13, 1973, petitioner suggested that there had been significant

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[1] In a letter to the Court, dated October 15, 1973, respondent Grand Duchess of Saxony-Weimar joined in the opposition filed by the Federal Republic.

international developments since the filing of the original petition which merited this Court's consideration. Petitioner pointed to the recent admission of both Germanys to membership in the United Nations and urged that the United States' willingness to treat the GDR as a sovereign in the United Nations be deemed to constitute an "implied recognition" of that government by the United States. In view of these developments, petitioner suggested that the Court grant the petition and either reverse the decision below on the ground that the "implied recognition" of the GDR has now removed petitioner's incapacity to sue, or vacate the judgment of the court of appeals and remand for reconsideration in light of the changed circumstances.

Respondent Federal Republic then filed with this Court a supplemental brief changing the conclusion in its original brief in opposition, and stating that it "has no objection to this case being remanded" to the court of appeals "for reconsideration or for a stay of all proceedings due to changed circumstances."

DISCUSSION

The "Suggestion of Interest" which the Executive Branch filed in the district court in July 1969 was prompted by a request from the Federal Republic. Since that time, the relationship between the Federal Republic and the GDR has undergone significant changes. The Department of State understands that if the Federal Republic were to prevail in its replevin action against the respondent Elicofon, the paintings which form the subject of the action would shortly be turned over by the Federal Republic to the GDR.

In view of these developments, the Executive Branch would not object if petitioner were granted leave to

intervene in the district court in the action instituted by the Federal Republic.[2]

CONCLUSION

For the foregoing reasons, the United States has no objection to the granting of the petition for a writ of certiorari and the vacation of the judgment of the court of appeals so that the case may be remanded to the district court with a direction that the petitioner be permitted to intervene in the action instituted by the Federal Republic (No. 69-C-93).

Respectfully submitted.

ROBERT H. BORK,
Solicitor General.

JANUARY 1974.

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[1] We believe, however, that the courts below correctly decided the case on the record as it then stood.

No. 73-492

JAN 24 1974

MICHAEL RODAK, JR., CLERK

In the

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OCTOBER TERM, 1973

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against

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Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE RESPONDENT EDWARD I. ELICOFON IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

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No. 73-492

In the

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OCTOBER TERM, 1973

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Petitioner,

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE RESPONDENT EDWARD I. ELICOFON IN RESPONSE TO THE MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

This reply brief is submitted on behalf of the respondent Edward I. Elicofon in response to the Memorandum for the United States as *amicus curiae* filed on January 17, 1974.

The Memorandum was submitted in response to the Court's order of December 3, 1973, inviting a brief expressing the views of the United States. The statement of these views, under the heading "Discussion", occupies two paragraphs of the Memorandum at pages 4 and 5, and their substance may be even more succinctly summarized in the following three points:

1. The two decisions of the district court, in 1970 and 1972,[1] and the decision of the court of appeals in April 1973 affirming them, were "correctly decided on the record as it then stood."

2. "[T]he relationship between the Federal Republic and the GDR has undergone significant changes" since the commencement of the litigation in 1969.

3. The Executive Branch "would not object" if the Kunstsammlungen zu Weimar were permitted to intervene in the action begun by the Federal Republic.

With all deference, the Memorandum provides no acceptable basis for the action by this Court which it suggests and omits to note points important for this Court's consideration of the pending petition, thus necessitating this reply.

1. It continues to be the fact that the United States has not recognized the East German regime.

In the Memorandum the Solicitor General pointedly has not taken up the labored contention in the Supplemental Brief of the Kunstsammlungen zu Weimar that the United States has given implied recognition to the GDR in supporting the admission of both the Federal Republic and the GDR to the United Nations. The discussion in the Memorandum focuses, instead, on changes in the relations be-

1. The first decision in the district court (Pet. 6a-11a) held that the unrecognized government of the German Democratic Republic (GDR) could not itself appear as a litigant, but left for further proceedings, which eventually included depositions in Vienna of East German witnesses, the factual question of the relationship between the Kunstsammlungen zu Weimar and the GDR. In the second decision (Pet. 11a-15a) the district court found the Kunstsammlungen to be an arm and instrumentality of the GDR, given corporate status to facilitate suit, and excluded it.

tween the two Germanys.[2] However, the issue decisive in the district court and the court of appeals was the fact of non-recognition, and that fact, as the Memorandum makes clear by plainest implication, has not changed. The original Suggestion of Interest of the United States, the substance of which is quoted at pages 2 and 3 of the Memorandum, is unrevoked.

The Memorandum nonetheless states that the Executive Branch would not object to a remand with a direction to permit the Kunstsammlungen to intervene.[3] The principle thus urged by the Memorandum (if it can be said that the Memorandum rests upon anything other than the *ipse dixit* of the Executive Branch) is necessarily the startling if

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2. The Memorandum is disingenuously imprecise as to what changes in relations between the Germanys it has reference to. While the Kunstsammlungen, in papers filed in the district court, called attention to the developing *Ostpolitik* of the Brandt government, the principal event no doubt is the so-called Treaty on Fundamental Relations or *Grundvertrag*, which was signed in December, 1972. This event thus substantially antedated the presentation of the appeal in the court of appeals, which heard the case in April, 1973, and was a circumstance heavily relied on in the brief to the court of appeals of the Kunstsammlungen. (The passage on this subject from pages 18 and 19 of the Kunstsammlungen's brief to the court of appeals is set out in Annex A to this reply brief). A copy of the text of the treaty was submitted to the court of appeals in connection with the Kunstsammlungen's unsuccessful application to that court dated March 8, 1973, for a stay of proceedings. The principal event in these changed German relations was thus as much a part of the "record as it then stood" in the court of appeals as it is in this Court. Yet the Memorandum concedes the correctness, on that record, of the decision in the court of appeals, while finding it possible to argue here that "significant changes" justify vacating that decision and, in effect, reversing it in result.

3. In so doing, but without so stating, the Solicitor General asks this Court to grant the writ of certiorari and to rule on aspects of intervention which have been passed on by neither the district court nor the court of appeals, which found it unnecessary to reach them in light of the conclusion that the Kunstsammlungen was in any event disqualified as a litigant. See Pet. 11a.

unadvertised novelty that despite non-recognition the courts should (must?) admit as litigants non-recognized governments (and their instrumentalities) where "significant changes" in the relations of those non-recognized governments with other foreign governments have occurred. The doctrine of non-recognition, which has as its justification a concern for the relations between the United States and a foreign government not yet recognized by the United States, see *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398, 410-11 (1964), is thus wholly (and inexplicably) transformed. And because the new formulation of it is dependent on facts or views of the relations *inter sese* of foreign governments to which the courts have no access, the doctrine becomes not only meaningless but judicially unmanageable.

In short, what is proposed is a manipulation of the doctrine of non-recognition at whim. A clear majority of the Court has recently rejected very nearly identical reasoning in refusing to approve the so-called Bernstein exception to the act of state doctrine. *First National City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759, 772 (Douglas, J., concurring: "the Executive Branch 'cannot by simple stipulation change a political question into a cognizable claim' "); *id.* at 773 (Powell, J., concurring: ". . . I would be uncomfortable with a doctrine which would require the judiciary to receive the Executive's permission before invoking its jurisdiction. Such a notion, in the name of the doctrine of separation of powers, seems to me to conflict with that very doctrine"); *id.* at 778 (Brennan, J., with whom Stewart, Marshall and Blackmun, JJ., joined, dissenting: "[The Bernstein exception] would require us to abdicate our judicial responsibility to define the contours of the act of state doctrine so that the judiciary does not become embroiled in

the politics of international relations to the damage not only of the courts and the Executive but of the rule of law").

If the Executive Branch were prepared to urge the abandonment of the doctrine of non-recognition, it might reasonably be expected to say so plainly enough to be understood. The Memorandum obviously urges no such proposition, confining its suggestion to the expediencies of this suit alone. If the doctrine is to be retained, it can serve as a principle to be applied by courts only if it remains capable of formulation by reference to objective circumstances which a court, in the exercise of a traditional judicial function, can identify, appraise and apply generally in all appropriate cases. The Memorandum suggests no content for the doctrine consistent with that requirement.

2. To accept the result suggested in the Memorandum would reward calculated delay, prejudice private rights and subvert the doctrine of finality.

The record demonstrates how tardily the Kunstsammlungen has pressed its claim to litigant status, first raised nearly five years ago in April, 1969. In the course of proceedings concerned with that claim, the parties have been subjected to the delay and expense of depositions in Vienna, hearings in the district court preceding the two decisions, and an appeal to the court of appeals which was presented only after extensions of time and the exhaustion at each step of all or very nearly all of the maximum time available. The decision of the court of appeals affirming the district court was preceded by an unsuccessful effort to obtain an indefinite stay and followed by an unsuccessful application for rehearing and a suggestion for rehearing en banc. The petition to this Court, in turn, was filed only after unsuc-

cessful efforts to obtain extensions of time to file or in the alternative a stay of proceedings here.

The course now suggested by the Memorandum that the decision be vacated and the case remanded with a direction that the Kunstsammlungen be permitted to intervene, would constitute the plainest invitation to an unrecognized government in any subsequent case to impede the progress of litigation in the courts, in hopes of ultimate recognition, or, failing that, in hopes merely of a change in its relationship with some other foreign government. The expense and delay to the respondent in this case have already been large. Now to be told, as is suggested, that "new relationships" between two foreign governments, rather than recognition by the United States, impel the reversal of "correct decisions" in the courts below predicated upon non-recognition that continues to date, would properly invite sharp criticism of the judicial process.

3. There is no occasion for granting the writ.

None of the guidelines for granting of the writ, laid down in Rule 19, are met in this case. Far from involving a conflict with other decisions or other applicable law, or a novel question of federal law requiring a decision here, or a departure from the accepted and usual course of judicial proceedings, the decisions below are conceded to have been "correct" on the record on which they rested. The critical fact in that record, the non-recognition of the GDR, is unchanged. A grant of the writ in this case could only serve to cast unexplained doubt on the doctrine of non-recognition as it has been consistently applied for more than a century.

If recognition is sought by the GDR and granted by the United States, the courts can take appropriate note of it. If as a consequence of that event, should it occur, rights be thought to be conferred upon the Kunstsammlungen in

respect of matters at issue in this litigation, an appropriate application can be made to the district court. There is no need for this Court to provide a remedy in anticipation of that necessarily problematical future event.

CONCLUSION

For the reasons stated above, and in the respondent's principal brief in opposition to the petition, the writ prayed for should be denied.

New York, New York
January 24, 1974

Respectfully submitted,

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ANNEX A

[Annex A consists of the text of a passage from pages 18 and 19 of the Brief for the Kunstsammlungen zu Weimar to the United States Court of Appeals for the Second Circuit dated February 23, 1973.]

One final word should be said. At this moment, in February 1973, there is not only no justification for denying to the GDR government the right to sue, there is every reason to grant it that right. This Court can take judicial notice of the following recent significant developments:

1. The governments of the United States and the GDR are fellow signatories to at least one multilateral agreement (66 Dep't of State Bulletin 645 (May 1, 1972)).

2. In early November 1972, the United States joined in a four-power statement (with the United Kingdom, France and the Soviet Union) declaring its intention to support the application of the GDR government for membership in the United Nations (20 The Bulletin (Bonn) 304 (November 14, 1972)).

3. In November 1972, the GDR government was granted the right to seat a Permanent Observer at the United Nations, and it now has such a representative in attendance there (N.Y. Times, Jan. 5, 1973, at 1, col. 1).

4. On November 21, 1972, the GDR government was admitted to membership in UNESCO (N.Y. Times, Nov. 22, 1972, at 4, col. 7).

5. On December 21, 1972, the governments of the GDR and the Federal Republic of Germany signed a treaty in which each recognizes the other as a legitimate sovereign government and establishes a full system of relations with

the other (N.Y. Times, Dec. 22, 1972, at 1, col. 8). (The treaty, in unofficial translation, appears in 20 The Bulletin (Bonn) 293 (November 14, 1972).)

6. The United States government is now negotiating (or is about to commence negotiations) for the establishment of diplomatic relations with the GDR government (N.Y. Times, Jan. 5, 1973, at 1, col. 1).

7. More than seventy States (including most recently the United Kingdom and France) have established diplomatic relations with the GDR government as the legitimate sovereign government for East Germany (N.Y. Times, Feb. 10, 1973, at 14, col. 4).[1]

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1. Among the other States which recently established diplomatic relations with the GDR government are:

Australia (Dec. 22, 1972)	Norway (Jan. 17, 1973)
Austria (Dec. 21, 1972)	Peru (Dec. 28, 1972)
Belgium (Dec. 27, 1972)	Spain (Jan. 10, 1973)
Denmark (Jan. 9, 1973)	Sweden (Dec. 21, 1972)
Finland (Dec. 8, 1972)	Switzerland (Dec. 20, 1972)
Netherlands (Jan. 6, 1973)	Tunisia (Dec. 17, 1972)
Uruguay (Dec. 24, 1972)	

SUPREME COURT, U. S.

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FEB 2 1974

MICHAEL RODAK, JR., CLERK

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Petitioner,

—against—

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Respondents.

BRIEF FOR PETITIONER IN RESPONSE TO REPLY BRIEF OF RESPONDENT ELICOFON

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Respondents.

BRIEF FOR PETITIONER IN RESPONSE TO REPLY BRIEF OF RESPONDENT ELICOFON

On January 17, 1974, the Solicitor General filed a Memorandum for the United States as *amicus curiae,* stating that the Executive Branch would not object if petitioner were now granted leave to intervene and recommending that the petition for a writ of certiorari be granted, the judgment of the court of appeals vacated, and the case remanded to the district court with a direction that petitioner be permitted to intervene. On January 24, 1974, respondent Edward I. Elicofon submitted a reply brief in response to the Memorandum. This brief for petitioner responds to Elicofon's reply brief.

Elicofon faults the Solicitor General because he refuses to accept (as Elicofon has persistently urged) that the

rule excluding nonrecognized governments from suing in our courts is an absolute rule keyed to the formal act of executive recognition and tolerating no consideration whatever of executive policy short of formal recognition. The policy reasons for the rule, however, do not contemplate such inflexibility; and the opinions in *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. 759 (1972), to which Elicofon refers to support his view, make clear rather that in determining when and to what extent nonrecognized governments should be barred from the courts, views of the Executive Branch such as those here articulated are most pertinent.

Elicofon's reliance on the concurring and dissenting opinions in *First National City Bank* is, to say the least, disingenuous. For he wholly ignores the fact that the act of state doctrine and its policy underpinnings, which that case involved, are quite different from the nonrecognition rule and the policy considerations underlying it. The distinction was plainly articulated in the dissenting opinion of Justice Brennan (in which Justices Stewart, Marshall and Blackmun joined):

> "My Brother Rehnquist's opinion attempts to bolster its result by drawing an analogy between the act of state doctrine and the rule of deference to the Executive in the areas of sovereign immunity and recognition of foreign powers. That rule has itself been the subject of much debate and criticism. . . . The analogy, in any case, is not persuasive. When the Judicial Branch in the past has followed an Executive suggestion of immunity in behalf of a foreign government or accorded significant weight to the failure of the Executive to make such a suggestion, the result has been simply either to foreclose judicial consideration of the claim against that government or

to allow the suit to proceed on the merits of the claim and any other defenses the government may have. . . . Similarly, when the Judicial Branch has abided by an Executive determination of foreign sovereignty, the consequence has been merely to require or deny the application of various principles governing the attributes of sovereignty. . . . In no event has the judiciary necessarily been called upon to assess a claim under international law. The effect of following a 'Bernstein letter,' of course, is exactly the opposite—the Judicial Branch must reach a judgment despite the possible absence of consensus on the applicable rules, the risk of irritation to sensitive concerns of other countries, and the danger of impairment to the conduct of our foreign policy. . . ." (406 U.S. at 789-90, n. 13, citations omitted)

Justice Brennan pointed out that *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. 398 (1964), had held that in determining whether the courts should inquire into the validity of a foreign act of state, numerous circumstances* must be considered, and that the possible impairment of the Executive's conduct of foreign affairs is but "one—and *not necessarily the most important*—of those circumstances" (406 U.S. at 788, emphasis supplied). It was on this analysis that he concluded that the "Executive Branch . . . cannot by simple stipulation change a political question into a cognizable claim" (*id.* at 789) and that the "Bernstein exception" should be rejected. The phrases which Elicofon snatches from Justices Douglas' and Powell's

* For example, "the absence of consensus on the applicable international rules, the unavailability of standards from a treaty or other agreement, the existence and recognition of the Cuban Government, the sensitivity of the issues to national concerns, and the power of the Executive alone to effect a fair remedy for all United States citizens who have been harmed. . ." (406 U.S. at 788).

opinions reflect their agreement with the views of Justice Brennan in this regard (*id.* at 772, 774).

Moreover, the dissenting and concurring Justices in *First National City Bank* did not question that even where the act of state doctrine was concerned the views of the Executive should be considered. As Justice Brennan noted, "six members of this Court recognize today [that] the reasoning of that case [*Sabbatino*] is clear that the representations of the Department of State are entitled to weight for the light they shed on the permutation and combination of factors underlying the act of state doctrine" (*id.* at 790).*

In the circumstances of this case, the views of the Executive Branch (as now articulated by the Solicitor General) are not only entitled to consideration, they may well be controlling. For, in contrast to the factors relevant where the validity of an act of foreign state is in issue, the *sole* reason for preventing a nonrecognized government from suing is to avoid the embarrassment to and interference with the Executive's exercise of the foreign affairs function which might follow from judicial acceptance of a foreign government as litigant while the Executive refuses to recognize its sovereignty. Where the Executive advises the Court that it has no objection to admission of the nonrecognized government as a party, there can no longer be embarrassment to or interference with the Executive. Thus there is no longer any justification for denying the foreign government access to our courts.

Taking the Executive's views into account in such a case would not be abdicating the judicial function. Rather, to ignore a policy statement of the Executive Branch other

* See also, Powell, J., *id.* at 774. Justice Rehnquist (and the Chief Justice and Justice White, who joined in his opinion) would regard the Executive's views as determinative (*id.* at 767-68).

than the formal act of recognition and to refuse to permit a foreign government to sue despite the Executive's assurance that to do so would not interfere with his foreign affairs function shirks the courts' responsibility to decide cases where appropriate jurisdictional standards are met. See *First National City Bank* v. *Banco Nacional de Cuba*, 406 U.S. at 763; *Banco Nacional de Cuba* v. *Sabbatino*, 376 U.S. at 408. Where, as here, the reason for denying the nonrecognized government its day in court—possible embarrassment to the Executive—no longer exists, refusal to adjudicate the foreign government's claim can no longer be justified.

Elicofon complains (Reply Brief, p. 3, n. 2) that the Solicitor General's recommendation that petitioner now be permitted to intervene is inconsistent with his belief that the decisions below were correct "on the record as it then stood" (Memorandum, p. 5, note). But there is no inconsistency. The recommendation is made on the basis not only of changes in the relations between the two Germanys (which Elicofon claims predated the decisions below), but also by the admission of the German Democratic Republic to membership in the United Nations with the affirmative approval and vote of the United States; the Federal Republic's readiness, should it prevail, to turn over the paintings in suit to the GDR*; and, most importantly, the Executive Branch's withdrawal of objection to petitioner's participation in the suit. These latter developments all postdate the court of appeals decision.

Elicofon's assertion that a remand "would reward calculated delay, prejudice private rights and subvert the

* There is no question, of course, that if petitioner were excluded from the action, Elicofon would promptly move also to exclude the Federal Republic on the ground that it has no claim of title to or interest in the paintings.

doctrine of finality" (Reply Brief, p. 5) deserves little comment. The judicial process has moved slowly in this case not—as Elicofon would have it—because petitioner "tardily . . . pressed its claim to litigant status", but rather because respondents have persistently sought to deprive petitioner of its litigant status on grounds we have consistently urged are without merit. Petitioner has complied with procedural rules at all times and has never improperly delayed the proceedings. And the suggestion that a remand would subvert the doctrine of finality disregards the well established principle that supervening events will be considered by an appellate court in determining a just disposition of the matter before it. See, *e.g.*, *McLeod* v. *General Electric Co.*, 385 U.S. 533 (1967); *Patterson* v. *Alabama*, 294 U.S. 600, 607 (1935); *Watts, Watts & Co.* v. *Unione Austriaca di Navigazione*, 248 U.S. 9, 21 (1918). If anyone has been prejudiced by the delay, it is petitioner, which has been forced to wait more than five years to press its claim of rightful ownership to the paintings.

CONCLUSION

For the reasons stated above, in the petition and in petitioner's supplemental brief, a writ of certiorari should issue, the judgment of the court of appeals should be vacated, and the case should be remanded to the district court with directions to grant petitioner's motion for leave

to intervene in the Federal Republic action (69-C-93) and to vacate the order of dismissal in the independent action (69-C-370).

Respectfully submitted,

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February 4, 1974

No. 73-492

MAR 15 1974

MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1973

KUNSTSAMMLUNGEN ZU WEIMAR,

Petitioner,

—against—

FEDERAL REPUBLIC OF GERMANY, EDWARD I. ELICOFON and ELISABETH MATHILDE ISIDORE ERBGROSSHERZOGIN VON SACHSEN-WEIMAR-EISENACH (GRAND DUCHESS OF SAXONY-WEIMAR),

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR REHEARING

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PETITION FOR REHEARING

Petitioner respectfully moves the Court for an order granting a rehearing; vacating its denial of the petition for writ of certiorari entered on February 19, 1974; and granting the petition. As grounds for this motion, petitioner states, as follows:

1. The normalization of relations between the GDR Government and the Federal Republic Government will not afford adequate protection to petitioner in respect of the stolen Duerer paintings.

On December 3, 1973 this Court invited the Solicitor General to file a brief expressing the views of the United States. Shortly thereafter, the Solicitor General submitted a Memorandum for the United States as *Amicus Curiae,*

stating that "the Executive Branch would not object if petitioner were granted leave to intervene in the district court in the action instituted by the Federal Republic" (Memorandum for the United States, at 4-5).

Even though the exclusion of petitioner from this action was grounded primarily on the notion that to permit its intervention would conflict with our Executive's nonrecognition policy, and the Executive no longer objects to petitioner's participation, the Court denied the petition for certiorari. The denial of certiorari, we believe, may have been inspired by the Solicitor General's observation that "[t]he Department of State understands that if the Federal Republic were to prevail in its replevin action against the respondent Elicofon, the paintings which form the subject of the action would shortly be turned over by the Federal Republic to the GDR" (Memorandum for the United States, at 4). And by the Federal Republic's statement, in its supplemental brief, that it "has no objection to this case being remanded" to the court of appeals "for reconsideration or for a stay of all proceedings due to changed circumstances." The Court may have concluded that the interests of petitioner would be adequately protected by the Federal Republic, and that there was thus no need for it to address the difficult questions of constitutional and international law presented by the petition.

If these were the considerations which moved the Court to deny certiorari, the Court was misinformed. For, notwithstanding the significant recent changes in the relations between the GDR and the Federal Republic governments (which we believe themselves warrant a reversal of the decisions below), we have yet to be formally advised by the Federal Republic that, should it continue in the action and prevail, it would turn the paintings over to the GDR Government. The two governments have substantially normal-

ized their relations, but the process is by no means complete, and there is simply no guarantee that the Federal Republic, if successful, would in fact turn the paintings over to the GDR Government.

What is more significant, however, is that respondent Elicofon has made plain that he has no intention of permitting the Federal Republic to continue in the action in the event petitioner is excluded. Elicofon has indicated that he will move to dismiss the Federal Republic's action on the grounds that it has no claim of title to or interest in the paintings and no representative capacity to sue to recover them on behalf of the rightful owner. Even if this threshold challenge to standing were met by the Federal Republic, it might well be found when the merits are reached that its claim of title to the paintings is defective.* Accordingly, the continued participation of the Federal Republic in the action and its chances of success are by no means certain; and that the Federal Republic may intend to transfer the paintings to the GDR if it is successful does not obviate the need for petitioner's participation in the case if its interests are to be adequately protected.

2. The imminence of recognition is no reason to deny certiorari.

We believe that formal recognition of the GDR Government by the United States Government is imminent. Indeed, we have suggested that recent events have already led to implied recognition of the GDR Government, and

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* The district court intimated that it views any claim to the paintings as one to be asserted on behalf of the people of East Germany. But no evidence has yet been taken on the question of title. When it is, the district court may well conclude that the Federal Republic cannot speak for the people of East Germany or, as we have urged, that the claim can only be asserted by petitioner. (See Petition for Certiorari, at 19.)

that consequently the GDR Government (and, *a fortiori*, petitioner) should be permitted to sue in this case. Cognizant of this Court's policy to avoid decision on delicate questions of constitutional and international law where reasonable alternatives to decision exist, see, *e.g.*, *Kovacs* v. *Brewer*, 356 U.S. 604 (1958); *Alabama State Federation of Labor* v. *McAdory*, 325 U.S. 450 (1945), we understand how the prospect of early recognition might have created the impression that political developments might obviate the need for the Court to reach and resolve the important questions before it.

If certiorari was denied because of such considerations, the Court overlooked an essential point which was only briefly adverted to in our supplemental brief (at p. 6, note). If the GDR Government were shortly to be recognized by the United States, and petitioner thereupon commenced a new action for return of the paintings or renewed its motion to intervene in the pending action, Elicofon would doubtlessly insist that, notwithstanding recognition of the GDR, petitioner should then be barred by the statute of limitations.

We believe that such a challenge on statute of limitations grounds would prove unsuccessful, in view of Judge Rifkind's decision in *Steingut* v. *Guaranty Trust Co. of New York*, 58 F. Supp. 623, 637 (S.D.N.Y. 1944), *modified in part on other grounds, aff'd in part*, 161 F.2d 571 (2d Cir. 1947), *cert. dismissed*, 332 U.S. 753 (1947), *cert. denied*, 332 U.S. 807 (1947), which establishes that the statute of limitations is tolled during the period of nonrecognition under circumstances such as those here. There is, however, authority to the contrary. See, *e.g.*, *Union of Soviet Socialist Republics* v. *National City Bank of New York*, 41 F. Supp. 353 (S.D.N.Y. 1941).

And so resolution of the question of Kunstsammlungen's capacity to sue in the present case rather than in a newly commenced action (or on a new motion to intervene) is most desirable. For, inaction by this Court because of the changing political climate will merely create these additional statute of limitations questions, which will inevitably come to this Court for decision. The interests of judicial efficiency would better be served if petitioner's right to sue were confirmed within the framework of the pending actions.

3. In light of the withdrawal of our Executive's objection to suit by petitioner, the doctrine of nonrecognition should not bar petitioner from suing to recover the Duerer paintings.

That certiorari was denied notwithstanding the fact that the Executive Branch no longer has any objection to petitioner's intervention suggests that the Court has misapprehended the parameters of the nonrecognition doctrine recently suggested in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).

In the petition for certiorari, we sought to demonstrate that even if the doctrine of nonrecognition retained some vitality, it should not be viewed as an invariable rule which prohibits the judicial branch from accepting a foreign government (or a national closely related to it) as a plaintiff in *every* court and in *every* case. The rule was never intended to be so rigidly applied. Rather, as the *Sabbatino* Court made clear, diplomatic nonrecognition furnishes no reason absolutely to bar suit by an unrecognized government; it should preclude suit only where the underlying policy reasons for closing the courts to the foreign government suitor transcend the interests of the parties in securing a judicial determination of their rights.

As we pointed out in the petition for certiorari (at p. 10), the justification usually advanced for barring an unrecognized government from our courts is that to permit suit would be to compromise the policies underlying nonrecognition and impede the Executive's exercise of his foreign affairs function; the fear is that the resultant "judicial recognition" would both embarrass the nonrecognizing executive and dilute the effect of nonrecognition.

In this case, however, such fears have been completely dispelled by the Executive Branch's acknowledgment that it is agreeable to petitioner's participation. Our Executive has not gone so far as expressly to recognize the GDR Government; but by its declaration, it has informed the Court that to permit petitioner to sue here would *not* result in embarrassment to the Executive, cause conflict between the courts and the State Department, or give rise to any of the other dangers supposedly inherent in the acceptance of unrecognized governments as litigants. Moreover, the policy underpinnings of our Executive's nonrecognition of the GDR Government—*i.e.*, deference to the views of the Federal Republic which long saw itself as the only legitimate spokesman for the people of East Germany—are no longer relevant in light of the normalization of relations between the Federal Republic and GDR governments.

4. Petitioner has clearly met the guidelines for granting the writ laid down in Rule 19.

In his reply brief submitted in response to the Memorandum for the United States, Elicofon argued that petitioner failed to meet the requirements of Rule 19 because, among other things, its case did not present a novel question of federal law requiring decision by this Court. Our petition for certiorari, however, clearly shows that novel questions of federal law are presented here. This is further

demonstrated by the pointed reference in *Sabbatino* to the literature criticising the "doctrine that nonrecognition precludes suit by the foreign government in every circumstance" (376 U.S. at 411, n. 12), a clear signal of the Court's willingness to reconsider the doctrine, even though that could not be accomplished in the framework of the *Sabbatino* case. See Falk, *The Complexity of Sabbatino*, 58 Am. J. Int'l L. 935, 950, n. 49 (1964).

This case presents the Court with its first opportunity to confront the rule and make some sense out of it. The importance of the questions presented is underscored by their constitutional ramifications. The decisions below prevent a foreign national from obtaining any judicial determination of its rights to property stolen and transported to the United States, thus immunizing the thief's "title" from challenge in the courts and raising grave questions of substantive due process. And the due process considerations are all the more critical in view of the distinct possibility that the Federal Republic may be removed as a party plaintiff, thus leaving no party whatever even remotely connected with the true owner of the paintings.

Clearly, then, one cannot seriously dispute that this case poses important questions of federal law which have not been, but should be, settled by this Court.

CONCLUSION

For the reasons set forth above, as well as those contained in the petition for writ of certiorari, petitioner prays that this Court grant rehearing of the order of denial, vacate that order, grant the petition and either remand to the district court with a direction to permit intervention, or, in the alternative, review the decisions below.

Respectfully submitted,

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March, 1974

Certificate of Counsel

As counsel for the petitioner, I hereby certify that this petition for rehearing is presented in good faith and not for delay and is restricted to the grounds specified in Rule 58(2).

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